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EDITOR'S NOTE

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No. 86-281-CFY
Status: GRANTED

Title: John William Ray, Petitioner
v.
United States

Docketed:
August 20, 1986

Court: United States Court of Appeals
for the Fifth Circuit

Counsel for petitioner: Connors III, Joseph A.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Aug 20 1986	G	Petition for writ of certiorari filed.
2	Aug 20 1986		Appendix of petitioner John William Ray filed.
4	Sep 26 1986		Order extending time to file response to petition until October 25, 1986.
5	Oct 23 1986		Brief of respondent in opposition filed.
6	Oct 29 1986		DISTRIBUTED. November 14, 1986
7	Nov 17 1986		Petition GRANTED.
			**********
9	Dec 13 1986		Order extending time to file brief of petitioner on the merits until January 13, 1987.
10	Jan 6 1987	G	Motion of The Solicitor General to dispense with printing the joint appendix filed.
11	Jan 13 1987		Brief of petitioner John William Ray filed.
12	Jan 20 1987		Motion of The Solicitor General to dispense with printing the joint appendix GRANTED.
13	Jan 15 1987		Lodging received.
14	Jan 20 1987		Record filed.
15	Jan 20 1987		Certified copy of original record & proceedings, 4 volumes, received.
17	Feb 19 1987	N	Motion of The Solicitor General to vacate judgment filed.
21	Feb 23 1987		Opposition of petitioner to motion of The Solicitor General filed.
22	Feb 26 1987	X	Reply brief of respondent United States to opposition to motion filed.
23	Mar 2 1987		Further consideration of the motion of the Solicitor General to vacate judgment is deferred to the hearing of
24	Mar 2 1987		the case on the merits.
25	Mar 10 1987		Brief of respondent United States filed.
26	Mar 11 1987		SET FOR ARGUMENT. Tuesday, April 28, 1987. (4th case).
27	Mar 20 1987		CIRCULATED.
28	Apr 28 1987		ARGUED.

PETITION FOR WRIT OF CERTIORARI

BRF85

86-281

NO. _____

Supreme Court, U.S.
FILED
AUG 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

JOHN WILLIAM RAY,
Petitioner

VS.

UNITED STATES OF AMERICA,
Respondent

On Writ Of Certiorari
To The
United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR PETITIONER

BRF85

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QUESTION PRESENTED

1. Whether the Court of Appeals properly imposed the concurrent sentence doctrine to decline review of the indictment's Count 3 conviction, which involved six ounces of cocaine allegedly possessed by petitioner with intent to distribute where:

(a) the evidence is insufficient to support the jury's verdict of guilty on Count 3; and

(b) the Parole Commission will use said Count 3 conviction in setting the severity rating of petitioner's overall "actual offense behavior", thus increasing the length of incarceration before petitioner will be paroled.

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

JOHN WILLIAM RAY, Petitioner

VS.

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OPINION BELOW

United States v. Ray, No. 85-2700 (5th Cir. 6/2/86) is the unreported opinion of which review is sought in this Court. See A-3 to 25.[1]

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1 Appendix citations will be to its pages as "A-__". Record citations will be to "1R-__" for the Clerk's Record on Appeal, and to "2R-__" and 3R-__" respectively for Volumes 1 and 2 of the Reporter's Transcript of Trial Testimony.

JURISDICTION

28 U.S.C. § 1254(1) confers on this Court jurisdiction to review the decision in question by writ of certiorari. Pursuant to 28 U.S.C. § 1291, the Court of Appeals had appellate jurisdiction over the district court's final judgment in this criminal case. On June 2, 1986, the Court of Appeals entered its judgment. On June 25, 1986, the Court of Appeals denied petitioner's timely Motion For Rehearing With Supporting Affidavit, which motion had been timely filed on June 12, 1986. See A-56. On July 14, 1986, the Court of Appeals denied leave for petitioner to file an amended motion for panel rehearing. See A-63. Within the 59 day period following June 25, 1986, this petition was timely mailed for filing by the Clerk of this Court.

QUESTION PRESENTED (RESTATED)

Whether the Court of Appeals properly imposed the concurrent sentence doctrine to

decline review of the indictment's Count 3 conviction which involved six ounces of cocaine allegedly possessed by petitioner with intent to distribute where: (a) the evidence is insufficient to support the jury's verdict of guilty on Count 3; and (b) the Parole Commission will use said Count 3 conviction in setting the severity rating of petitioner's overall "actual offense behavior", thus increasing the length of incarceration before petitioner will be paroled.

REASON FOR REVIEW

The Federal Court of Appeals for the Fifth Circuit has rendered a decision herein in conflict with United States v. DeBright, 730 F.2d 1255 (9th Circuit 1984).

STATEMENT OF THE CASE

On June 18, 1985, two defendants, including this appellant, were originally indicted in a three-count indictment in Cause No. B-85-346. (1R-1 and 2.) Its Count 1

alleged a conspiracy from on or about May 25 to on or about June 3, 1985, to possess with intent to distribute a controlled substance; Count 2 alleged possession with intent to distribute one gram of cocaine on May 29, 1985; and Count 3 alleged possession with intent to distribute approximately six ounces of cocaine on May 30, 1985. (1R-1 and 2.)

On June 27, 1985, appellant pled not guilty to all three counts of the indictment. (1R-69.) Trial was had before a jury on August 27 and 28, 1985. The jury found appellant guilty of all three counts. (1R-20; 3R-331 and 332.) On October 2, 1985, the trial court sentenced appellant to seven years as to Count 1; seven years and five years special parole as to Count 2; and seven years and five years special parole as to Count 3. (1R-13; 3R-333, 341 and 342.) Written notice of appeal was filed on October 11, 1985.

(1R-10 to 12.) Appellant is presently incarcerated serving the sentences herein.

On January 14, 1986, petitioner timely filed his appeal brief in the Court of Appeals. The appeal raised issues, inter alia, concerning the sufficiency of the evidence to support petitioner's convictions on all three counts in the indictment. At pages 21 and 22 of his brief, petitioner represented to the Court of Appeals that:

> "This Court sometimes has a concurrent sentence doctrine. See United States v. Littrell, 574 F.2d 828, 830 (5th Cir. 1978); United States v. Ashley, 569 F.2d 975, 984 (5th Cir. 1978). Appellant submits that this doctrine is not applicable to this case because: (1) the evidence of appellant's guilt of the charged offenses is not overwhelming; and (2) [as appellant understands] the federal parole board's guidelines categorize drug offenders' eligibility for parole according to the amount of grams involved in the particular offender's case. For instance, [as appellant understands] if an offender's case involves 100 to 1000 grams, that offender is placed in category 5 and on a seven year sentence will be eligible for parole in 48 to 60 months. On the other hand, [as appellant understands] if an offender's case involves 1 gram or less,

that offender is placed in Category 2 and on a seven year sentence will be eligible for parole in 12 to 16 months."

In affirming the judgment herein, the Court of Appeals declined review of the insufficiency challenge to Count 3, saying (Slip Opinion, pp. 9 and 10; A-16 to 18):

> "Finding the evidence sufficient on counts one and two, and for the reasons hereinafter stated rejecting Ray's other complaints on appeal, we apply the concurrent sentence doctrine to decline review of the sufficiency of the evidence on count three. Because Ray's sentence on count three is to run concurrently with that on count two, our affirmance of the conviction on count two makes the review of the count three conviction unnecessary. United States v. Adi, 759 F.2d 404, 409 (5th Cir. 1985); United States v. Montemayor, 703 F.2d 109, 116 (5th Cir.), cert. denied, 104 S.Ct. 89 (1983). This doctrine may not be applied if 'there is a significant likelihood that the defendant will suffer adverse collateral consequences.' Montemayor, 703 F.2d at 116. Therefore, to avoid such potential adverse collateral consequences, we vacate the conviction on count three. However, our action 'in no way alters the jury's verdict or the conviction[] . . . . The effect of this judicial action is to suspend imposition of the sentence[].' Id. (footnote omitted). The suspension of the sentence is subject to later challenge if the government 'determines that the interests

of justice require reimposition of the sentence.' United States v. Cardona, 650 F.2d 54, 58 (5th Cir. 1981). The conviction would then be subject to appellate review. Id."

To assist the Fifth Circuit, petitioner filed a Motion For Rehearing With Supporting Affidavit in the Court of Appeals on June 12, 1985. (See A-26 to 55.) There, petitioner contended that:

"1. The Panel decision improperly invoked the concurrent sentence doctrine because in this case there is a significant likelihood that appellant will suffer adverse collateral consequences from the unreviewed Count 3 conviction.

"2. As to its treatment of the count three conviction and sentence herein, the Panel decision is in direct conflict with this Court's panel decision in United States v. Rubin, 591 F.2d 278 (5th Cir. 1979), after remand, 439 U.S. 810, 99 S.Ct. 67, 58 L.Ed.2d 102 (1978).

"3. As to its handling of Count 3, the Panel's decision herein violates appellant's Fifth Amendment rights not to be deprived of liberty without due process of law, in that appellant cannot obtain appellate review of his Count 3 conviction, and must remain incarcerated in part for that Count 3 crime, even though as to that Count 3 the Government

failed to sustain its burden of proof beyond a reasonable doubt.

"4. The Panel decision improperly invoked the concurrent sentence doctrine because the "qualified" vacation of appellant's Count 3 conviction, like a reversal for reasons other than being not guilty, does not avoid the significant likelihood that appellant will suffer adverse collateral consequences from the unreviewed conviction since in the Parole Commission's review and use of the 'actual offense behavior', the Parole Commission will consider a vacated conviction in determining the parole guidelines and offense severity rating because this Court's vacation of Count 3's conviction and sentence was on grounds not relating to guilt or innocence.

"5. The Panel decision improperly invoked the concurrent sentence doctrine because appellant is innocent of the Count 3 conviction and, therefore, the overall interests of justice outweighs the policy of judicial convenience."

On June 25, 1986, that Motion For Rehearing was denied. On June 24, 1986, counsel for petitioner first became aware of United States v. DeBright, 730 F.2d 1255, 1257-1260 (9th Cir. 1984), which reassessed and abandoned the concurrent sentence doctrine, since:

(a) such practice impermissibly infringes on the prosecutorial function of the executive branch;

(b) that doctrine infringes upon and denies appellant's right under 28 U.S.C. § 1291, to have the entire conviction reviewed by a court of appeals;

(c) it is not at all clear that that doctrine, if carefully applied, actually does serve the interest of judicial economy;

(d) the Court of Appeals cannot conclude in good conscience that it possess the ability to predict with sufficient certainty that there will be no adverse consequences to appellant from the unreviewed Court's convictions; and

(e) the advantages of reviewing each conviction on its merits substantially outweigh the threatened harm from any

resulting decrease in judicial efficiency.

Upon learning of the principles espoused by DeBright, petitioner's counsel promptly mailed to the Court of Appeals Appellant's Amended Motion For Rehearing, Appellant's Motion For Court To Enlarge Time For Appellant To File An Amended Motion For Rehearing, and Appellant's Motion For Stay Of Mandate. (A-57 to 62.) Thereafter, those motions were denied by the Court of Appeals. (A-63.)

ARGUMENT

Solicitor General's Expected Position

Of course while petitioner is seeking this Court's independent examination of the merits of this question under review, petitioner expects that, if invited, the Solicitor General's position herein will be

similar to Petitioner's presentation. Petitioner's counsel is aware of United States v. Rubin, 439 U.S. 810, 99 S.Ct. 67, 58 L.Ed.2d 102 (1978) [where at this Court the Solicitor General reasoned, Supplemental Brief pgs. 4 to 10, that the Court of Appeals for the Fifth Circuit had improperly applied the concurrent sentence doctrine under the circumstances of that case, because there was a significant likelihood that petitioner would suffer adverse collateral consequences as a result of the two unreviewed convictions; and that a reversal of the unreviewed convictions will favorably shorten the length of Rubin's incarceration]. Upon remand, the Court of Appeals went on to hold that because the Parole Commission looks to the "actual offense behavior" which can be reliably establish, the Court should not have applied the concurrent sentence doctrine because (a) Rubin's challenge to the unreviewed convictions were

on grounds related to guilt or innocence; and (b) under the Parole Commission guidelines, the recommended term of incarceration increases as the offense severity rating increases. United States v. Rubin, 591 F.2d 278, 281-282 (5th Cir. 1979). See also Mariscal v. United States, 449 U.S. 405, 101 S. Ct. 909, 66 L.Ed.2d 616 (1981). There, this Court's majority opinion reads:

> "This case arises on a petition for certiorari to the United States Court of Appeals for the Ninth Circuit, which affirmed petitioner's conviction on 10 counts of interstate transportation of property obtained by fraud, in violation of 18 U.S.C. § 2314, and on 12 counts of mail fraud, in violation of 18 U.S.C. § 1341. 626 F.2d 868. The court affirmed the interstate transportation convictions on the merits, and declined to address the 'rather complex issues' presented by the mail fraud convictions, invoking the discretionary 'concurrent sentence' doctrine. App. to Pet. for Cert. 6-7; see Barnes v. United States, 412 U.S. 837, 848, n. 16, 93 S.Ct. 2357, 2364, n. 16, 37 L.Ed.2d 380 (1973); Benton v. Maryland, 395 U.S. 784, 787-793, 89 S.Ct. 2056, 2058-2062, 23 L.Ed.2d 707 (1969). In light of the Solicitor General's concession in this Court that the mail fraud convictions were invalid, Memorandum in Opposition 4-5, we grant

the motion of petitioner for leave to proceed in forma pauperis, grant certiorari, vacate the judgment of the Ninth Circuit affirming the mail fraud convictions, and remand for reconsideration of the applicability of the 'concurrent sentence' doctrine to a conviction conceded by the United States to be erroneous."

Despite the executive confessions of error in Rubin and Mariscal, the various courts of appeals' continued judicial use, non-use and abolition of the doctrine at issue remain so varied that the bench and bar need guidance from this Court.

Meritorious Unreviewed Issue:

Insufficient Evidence With Regard To Six Ounce Crime

Having unsuccessfully moved for a judgment of acquittal in the district court (3R-199, 251), appellant urged at the Court of Appeals that the evidence was insufficient to support his conviction as alleged in the indictment's Count 3.

Viewed in the required light most favorable to the government, the government's

evidence, which has been adequately set forth in the opinion of the Court of Appeals, does not link petitioner to the possession of the six ounces of cocaine. The only evidence of a link, if any, between petitioner and that cocaine was informant Edelmiro Molina's testimony that Arturo Sandoval advised petitioner about this person that was willing to buy ten ounces of coke, "... and that this person was requesting ten ounces and they weren't sure if they could come up with the ten ounces but they had three ounces is what I heard John say and that they would have to go back and see if they could get the rest of it." (2R-97.) However, Molina also testified that when Sandoval told him he had the cocaine, Sandoval was in a vehicle with another person (2R-101); and the cocaine was picked up at Sandoval's apartment. (2R-104.) The trial record herein is devoid of any evidence, direct or circumstantial, as to

whether petitioner was involved in the alleged Count 3 crime for which he was convicted and incarcerated without opportunity for appellate review. There is no evidence that petitioner was either actually able to "get the rest of it" or thereafter gave it to Sandoval.

Appellant recognizes that proof of actual possession is not necessary, since constructive possession is sufficient. Such possession need not be exclusive, but may be shared with others, and may be proved by circumstantial as well as direct evidence. United States v. Wilson, 657 F.2d 755 (5th Cir. 1981). "However, whatever the nature of the evidence, it must be such that a jury may reasonably infer that the person charged with constructive possession had dominion and control over the drug." United States v. Stephenson, 474 F.2d 1353, 1355 (5th Cir. 1973). Constructive possession has been defined as "the knowing exercise of, or the

knowing power or right to exercise, dominion and control over the proscribed substance." United States v. Glasgow, 658 F.2d 1036, 1043 (5th Cir. 1981). Absent evidence that petitioner actually obtained the cocaine and thereafter gave it to Sandoval, a reasonably minded jury should have had a reasonable doubt as to the existence of petitioner's "knowing exercise of, or the knowing power or right to exercise, dominion and control over the proscribed substance." United States v. Stephenson, 474 F.2d 1353, 1355 (5th Cir. 1973); United States v. Glasgow, supra. In short, there was no proof of possession, actual or constructive. See also United States v. Jackson, 526 F.2d 1236, 1237 (5th Cir. 1976)[where the Court reversed because "... there is no evidence that he [Jackson] exercised any measure of dominion or control over the contraband"].

Parole Commission Guidelines

According to the United States Parole Commission guidelines, the effect of the unreviewed count herein is to raise the severity of petitioner's offense from Category 3 (formerly "moderate severity") to Category 5 (formerly "very high severity"). See 28 C.F.R. § 2.20, Chapter Nine, subchapter C(c) and (e). Thus, assuming petitioner would receive a salient factor score that gave him a "fair" parole prognosis, the guidelines recommend that he serve 48 to 60 months where the offense characteristic is Category 5 (formerly "very high") instead of 18 to 24 where the offense's characteristic is Category 3 (formerly "moderate). See 28 C.F.R. § 2.20.

The Court Of Appeals Improperly Declined Review

The instant case presents a seminal context within which this Court can provide guidance to the various circuit courts in the

abolition of or the proper application of the concurrent sentence doctrine. Since Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), disparate application of the doctrine has become its hallmark. Here, all must assume that the United States Parole Commission will follow its own guidelines, for experience indicates that the overwhelming

majority of parole decisions fall within the guidelines.[2] The "parole feature" of the unreviewed Count is to escalate the likely period of petitioner's incarceration from between 18 to 24 months up to between 48 to 60 months. With the offense severity depending on the amount of cocaine involved, the possible "cocaine designations", together with the corresponding cocaine amounts, are as follows: Category 6 (more than 1 kilogram); Category 5 (more than 1 kilogram but Commission finds that the offender had only a peripheral role, or 100 grams to 1 kilogram); Category 4 (5 to 99 grams); Category 3 (1 to 4.9 grams); Category 2 (less than 1 gram);

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2 Ruip v. United States, 555 F.2d 1331, 1335 (6th Cir. 1977); United States v. Salerno, 538 F.2d 1085, 1087 (3rd Cir. 1976); Kortness v. United States, 514 F.2d 167, 169 (8th Cir. 1975); Project, Parole Release Decision Making and the Sentencing Process, 84 Yale L.J. 810, 825 n. 75 (1975).

and Category 1 (simple possession). See 28 C.F.R. § 2.20, Chapter nine, subchapter C.

The Court of Appeals reviewed appellant's convictions involving one (1) gram of cocaine, and the conspiracy count which did not alleged the amount of cocaine involved. That Court declined to review the Count 3 conviction where petitioner was allegedly involved with possession of six ounces of cocaine. Taken together, all counts qualify petitioner's offense for placement in Category 5 (formerly "very high severity"), when appellant should be classified with a rating of Category 3 (formerly "moderate severity") if only the "unreviewed count" would not be considered by the Parole Commission.

Petitioner believes that the Court of Appeals should not have applied the concurrent sentence doctrine in this case. Under these circumstances and as a result of the unreviewed conviction, there is a significant

likelihood that petitioner will suffer adverse collateral consequences (lengthened incarceration = reduced parole opportunity). Application of the concurrent sentence doctrine in such a situation is improper.

In Benton v. Maryland, 395 U.S. 784, 787-791, 89 S.Ct. 2056, 2058-2061, 23 L.Ed.2d 707 (1969), this Court reviewed the historical evolution of the concurrent sentence doctrine and recognized the utility of that doctrine as "a rule of judicial convenience." Finding that the dispute in Benton did not present the question, this Court expressly abstained from considering whether constitutional problems might be created by "an attempt to impose collateral consequences after an initial refusal to review a conviction on direct appeal because of the concurrent sentence doctrine ***" Id at 395 U.S. 791, 89 S. Ct. 2061 n. 7.

In the aftermath of Benton, the Fifth Circuit Court has stated that application of the concurrent sentence doctrine is appropriate when "prejudice is not apparent and the possibility of adverse collateral consequences appears to be remote." United States v. Binetti, 547 F.2d 265, 269 (5th Cir. 1977). However, in United States v. Rubin, 591 F.2d 278, 280 (5th Cir. 1979), after remand, 439 U.S. 810, 99 S.Ct. 67, 58 L.Ed.2d 102 (1978), the Fifth Circuit Court of Appeals said: "Despite such statements, we have often applied the doctrine mechanically without really considering the adverse consequences." The Court went on to hold that because the Parole Commission looks to the "actual offense behavior" which can be reliably establish, the Court should not have applied the concurrent sentence doctrine because (1) Rubin's challenge to the unreviewed convictions were on grounds related to guilt or innocence; and

(2) under the Parole Commission guidelines, the recommended term of incarceration increases as the offense severity rating increases. Id at 591 F.2d 281-282.

In United States v. Cardona, 650 F.2d 54, 57-58 (5th Cir. 1981)(Cardona), the Court of Appeals introduced a new wrinkle into the concurrent sentence doctrine equation. There the Court of Appeals borrowed from United States v. Hooper, 432 F.2d 604, 606 (D.C. Cir. 1970) (Hooper), a robbery case, saying:

> "Padron-Silva and Padron both received sentences on Count III which are to run concurrently with those imposed for their valid convictions on Counts I and II. In these circumstances, affirmance under the concurrent sentence doctrine would make unnecessary the detailed review of their Count III convictions. Rather than affirm or make a detailed review of sufficiency at this time, we choose another course. In United States v. Hooper, 432 F.2d 604, 606 (D.C.Cir.1970), that court vacated a judgment of conviction for which a concurrent sentence was imposed, observing that vacation of such a judgment 'does not impair any need of the government, avoids the possibility of adverse collateral consequences to defendant, and furthers the general

interest of the administration of justice ....' The Court then noted,

> The vacation of the judgment does not destroy the jury verdict, but is rather equivalent in practical effect to a suspension of the imposition of sentence. If it later develops that the interest of justice so requires, the sentence can be reimposed on a concurrent basis. The conviction could then be subject to appellate review.

432 F.2d 606 n.8. The wisdom of this practice has been previously recognized. See United States v. Warren, 612 F.2d 887, 895 (5th Cir. 1980)(en banc) (Roney and Hill, JJ., concurring and dissenting). We deem the Hooper approach to be appropriate in this case. Accordingly, we vacate the convictions of Padron-Silva and Padron on Count III. If the government subsequently determines that the interests of justice require reimposition of the sentences, then it may interpose its objections and these vacated convictions would then be open to appellate review."

In the United States v. DeBright, 730 F.2d 1255, 1257-1258 (9th Cir. 1984), the Court, inter alia, finding impractical the "wisdom" of Hooper, said:

> "Finally, there are substantial practical difficulties with the implementation of Hooper. Under Hooper, the judgment of conviction is vacated but

the jury verdict remains intact. The government is then invited to seek reinstatement of the judgment at any point in the future if new or changing circumstances make a conviction significant. Hooper, 432 F.2d at 606 n. 8. If the conviction were reinstated, it would then be subject to appellate review. Id. This unwieldy procedure is fraught with the potential for delay and the wasting of judicial resources. Inevitably, it would result in fragmented appeals of issues that could have been disposed of by the original reviewing court. This practice also places an onerous burden on the government to monitor ongoing circumstances that might be relevant to the previously unreviewed convictions. Consider, for example, a Parole Commission which considers a ten-year-old unreviewed conviction relevant to its determination of a parole date. The vacated conviction would then be significant to the government under Hooper. Presumably, the Parole Commission would then recess, while the government seeks reinstatement of the judgment of conviction, after which the defendant would appeal. If the previously unreviewed conviction were affirmed, a year or so later, the Parole Commission would resume consideration of a parole date. If the conviction were instead reversed, the government and defendant would attempt to find witnesses and evidence to retry a now stale case. We reject this procedure as impractical.

"In some appeals from multiple count criminal convictions with concurrent sentences, the societal interests and those of the administration of justice

> may point towards the wisdom of dismissal of a count. But that can best be accommodated in our system by an appropriate policy instituted by the Department of Justice, not by the ad hoc actions of an appellate court."

Nevertheless, since Cardona, the Court of Appeals for the Fifth Circuit has once again reverted to using the Hooper approach to "mechanically" apply the concurrent sentence doctrine "without really considering the adverse consequences." United States v. Rubin, supra, at 591 F.2d 280. See e.g., United States v. Adi, 759 F.2d 404, 409 (5th Cir. 1985); United States v. Montemayor, 703 F.2d 109, 116 (5th Cir. 1983), cert.denied, ___ U.S. ___, 104 S.Ct. 89, __ L.Ed.2d ___ (1983); and the case at bar. Upon latching onto the Hooper approach, the Fifth Circuit Court failed to consider that indeed the simple vacation of Hooper's Count 1 conviction probably avoided the possibility of any adverse collateral consequences to Hooper, because Hooper's Count 2 conviction was for

the "same robbery, of the same premises and the same money ...." Hooper, supra, at 432 F.2d 604.

Need For A Bright Line Decision

The Ninth Circuit has now abandoned the concurrent sentence doctrine. United States v. DeBright, 730 F.2d 1255 (9th Cir. 1984).

In United States v. Holder, 560 F.2d 953, 955-956 (8th Cir. 1977), the Eighth Circuit Court refused to apply the concurrent sentence doctrine because it feared an unreviewed conviction would reduce Holder's parole opportunities. Despite its holding in Holder, the Eighth Circuit has not abandoned the concurrent sentence doctrine. See, e.g., United States v. Eisler, 567 F.2d 814, 818 (8th Cir. 1977).

Other Courts of Appeals have followed a variety of approaches. The Second Circuit Court has said that "utilization of the concurrent sentence doctrine is now the

exception rather than the rule ...." United States v. Ruffin, 575 F.2d 346, 361 (2nd Cir. 1978). The Fourth Circuit Court has said: "[W]e cannot predict with certainty whether the RICO convictions will at some future point work some unforeseen harm to the defendants. *** We refuse to place the risk of future collateral consequences upon the defendants." United States v. Webster, 639 F.2d 174, 182-183 (4th Cir. 1981), cert. denied, 454 U.S. 857, 102 S.Ct. 307, 70 L.Ed.2d 152 (1981). The Fifth Circuit has declined, on the one hand, to apply the doctrine because the Government had "not affirmatively demonstrated that the likelihood of harm either in the form of collateral consequences or of prejudice in sentencing and at trial was so remote or to be insignificant on the facts." United States v. Evans, 572 F.2d 455, 477 (5th Cir. 1978), cert. denied, 439 U.S. 870, 99 S.Ct. 200, 58 L.Ed.2d 182 (1978). On

the other hand, the Fifth Circuit applied the doctrine in United States v. Strickland, 509 F.2d 273, 274 (5th Cir. 1975) because the appellant had "not shown any reason why the [unreviewed] convictions ... add anything material to the pains and penalties he will suffer from the [affirmed] conviction." Accord, United States v. Smith, 550 F.2d 277, 288 (5th Cir. 1977), cert. denied, 434 U.S. 831, 98 S.Ct. 138, 54 L.Ed.2d 105 (1977); Government of the Canal Zone v. Fears, 528 F.2d 641, 644 (5th Cir. 1976). The Sixth Circuit has exercised its discretion to resolve some claims and pretermit others, without stating a general rule. Compare, e.g., United States v. Maze, 468 F.2d 529, 536 n. 6 (6th Cir. 1972), affirmed, 414 U.S. 395, 94 S.Ct. 645, 38 L.Ed.2d 603 (1974), with Ethridge v. United States, 494 F.2d 351 (6th Cir. 1974), cert. denied, 419 U.S. 1025, 95 S.Ct. 504, 42 L.Ed.2d 300 (1974). The Sixth

Circuit sometimes has assumed the existence of adverse consequences in its refusal to apply the doctrine. See, e.g., Gentry v. United States, 533 F.2d 998, 1001 (6th Cir. 1976). The Seventh Circuit has said that it will consider the validity of all challenged convictions unless "there is no possibility of undesirable collateral consequences attendant upon these convictions...." United States v. Tanner, 471 F.2d 128, 140 (7th Cir. 1972), cert. denied, 409 U.S. 949, 93 S.Ct. 269, 34 L.Ed.2d 220 (1972); see also Crovedi v. United States, 517 F.2d 541, 550 (7th Cir. 1975); United States v. McLeod, 493 F.2d 1186, 1189 (7th Cir. 1974). In United States v. Montoya, 676 F.2d 428, 433 (10th Cir. 1982), cert. denied, 459 U.S. 856, 103 S.Ct. 124, 74 L.Ed.2d 108 (1982) the Tenth Circuit declined to apply the doctrine "because we find the issues raised by Montoya on counts III and IV to be uncomplicated."

In United States v. Warren, 612 F.2d 887, 895 (5th Cir. 1980)(en banc) (Roney, Hill, Clark, Fay and Vance, JJ., dissenting to the majority's failure to address the propriety of the concurrent sentence doctrine), it was stated that "The widespread haphazard application of the doctrine has been well documented. Comment, The Concurrent Sentence Doctrine After Benton v. Maryland, 7 U.C.L.A. - Alas. L. Rev. 282 (1978). In this and another law review article, a number of issues are thoughtfully presented and thoroughly discussed. Comment, The Federal Concurrent Sentence Doctrine, 70 Colum. L. Rev. 1099 (1970). It is now time to judicially resolve these issues."

This matter is ripe for resolution, which will bring uniformity to the decisions of the various courts of appeals. Persons convicted of federal crimes are entitled to an appeal. That right is empty if a court refuses to

decide the appeal. Under the concurrent sentence doctrine, which is founded solely on a concern for judicial economy, convictions resulting in concurrent sentences often go unreviewed despite "the obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences." Sibron v. New York, 392 U.S. 40, 55, 88 S.Ct. 1889, 1899, 20 L.Ed.2d 917 (1968). The Hooper approach is impractical as demonstrated in United States v. DeBright, supra. The Hooper approach fails to take into account that the Parole Commission looks to the "actual offense behavior" which can be reliably established and will consider reversed and/or vacated convictions unless such reversed or vacated conviction is on grounds related to guilt or innocence. See United States v. Rubin, 591 F.2d 278 (5th Cir. 1979), after remand, 439 U.S. 810, 99 S.Ct. 67, 58 L.Ed.2d 102 (1978).

Reasons To Abolish The Concurrent Sentence Doctrine

This Court should banish the various Circuit Courts' right to use that doctrine, since:

(a) such practice impermissibly infringes on the prosecutorial function of the executive branch;

(b) that doctrine infringes upon and denies appellant's right under 28 U.S.C. § 1291 to have the entire conviction reviewed by a Court of Appeals;

(c) it is not at all clear that that doctrine, if carefully applied, actually does serve the interest of judicial economy;

(d) a Court of Appeals cannot find that it possesses the ability to predict with sufficient certainty that there will be no adverse collateral consequence to appellant from each unreviewed Count's conviction;

(e) the advantages of reviewing each conviction on its merits substantially outweigh the threatened harm from any resulting decrease in judicial efficiency;

(f) the evidence of this appellant's guilt of the charged offenses is not overwhelming;

(g) "qualified" vacation of any of an appellant's convictions, like a reversal for reasons other than being not guilty, does not avoid the significant likelihood that appellant will suffer adverse collateral consequences from that unreviewed conviction, since in its review and use of the "actual offense behavior", the Parole Commission will consider each vacated conviction in determining the parole guidelines and offense severity rating because the Court's vacation would only be on grounds not relating to guilt or innocence;

(h) the overall interest of justice outweighs the policy of judicial convenience;

(i) an appellant has a constitutional due process right to not be incarcerated in part for any Count's crime, which the Government failed to prove beyond a reasonable doubt; and

(j) the Court of Appeals' invocation of the concurrent sentence doctrine herein violate appellant's Fifth Amendment rights not to be deprived of liberty without due process of law, in that without appellate review of all Counts of this conviction, appellant must remain incarcerated in part for a charged crime, as to which the Government failed to sustain its burden of proof beyond a reasonable doubt.

The number of counts in the indictment and the amounts of cocaine, which appellant was alleged to have possessed, will affect the

date on which appellant is paroled. To determine if appellant's assertions are correct, this Court should look to the United States Parole Commission guidelines as it did after Rubin v. United States, 439 U.S. 810, 99 S.Ct. 67, 58 L.Ed.2d 102 (1978). See United States v. Rubin, 591 F.2d 278 (5th Cir. 1979), cert. denied, 444 U.S. 864, 100 S.Ct. 133, 62 L.Ed.2d 87 (1979). Obviously, the severity ratings for the offenses of possession of a controlled substance are partially based on the amount of the controlled substance possessed. In assigning its severity rating, the Parole Commission looks to the "actual offense behavior" that can reliably be established. United States Parole Commission Research Unit, Guideline Application Manual (Nov. 1977). Since the offenses for which the prisoner is indicted, are deemed reliably established, the Parole Commission automatically considers vacated convictions of

alleged offenses in increasing its severity rating. Thus, there is a significant likelihood that any unreviewed Count's "vacated conviction" will, contrary to the Court's predictions, lengthen appellant's incarceration. Therefore, it would be improper for this Court to apply the concurrent sentence doctrine in this case. United States v. Holder, 560 F.2d 953, 955-956 (8th Cir. 1977); United States v. Rubin, supra at 591 F.2d 281-282; United States v. DeBright, supra at 730 F.2d 1257-1260.

CONCLUSION

For all the foregoing reasons, petitioner respectfully urges that this Court grant this petition for writ of certiorari, and remand this case to the Court of Appeals with instructions to review the pretermitted claim.

DATED: August 20, 1986.

Respectfully submitted by
Petitioner's Attorneys,

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NOTARIZED STATEMENT OF MAILING and
CERTIFICATE OF SERVICE

BEFORE ME, the undersigned authority, appeared affiant who said:

"I hereby certify under oath that to my knowledge: (1) I am a member of the bar of the United States Supreme Court; (2) I personally mailed, within the time allowed for filing, the original and forty true copies of the foregoing Petition For Writ Of Certiorari and its Appendix to the Clerk of the U.S. Supreme Court by personally depositing them in McAllen, Texas at the United States Post Office, with first-class postage prepaid, and properly addressed to said Clerk; and (3) I have on this date served upon all parties required to be served true copies of the foregoing Petition For Writ of Certiorari and its Appendix by personally depositing in the U.S. Mail, first-class postage prepaid, Return Receipt Requested, at McAllen, Texas and addressed to:

a. one copy addressed to:
Hon. Henry K. Oncken, AUSA
Attention: Hon. James R. Gough, AUSA
Appellate Division
P.O. Box 61129
Houston, Texas 77208

b. three copies addressed to:
Solicitor General
Department of Justice
Tenth Street & Constitution Avenue
Washington, D.C. 20530

c. one copy addressed to:
Mr. John William Ray
#29041079
Box 755, P.O. Box 7000
Texarkana, Texas 75501"

Affiant, JOSEPH A. CONNORS III

SUBSCRIBED AND SWORN to before me today, August 20, 1986.

Notary Public In and For
The State of Texas
FIDENCIO GUERRA, JR.

BEST AVAILABLE COPY

APPENDIX

BRF85

86-281

Supreme Court, U.S.
FILED
AUG 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

JOHN WILLIAM RAY,
Petitioner

VS.

UNITED STATES OF AMERICA,
Respondent

On Writ of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit

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ATTORNEYS FOR PETITIONER

BRF85

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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 85-2700
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN WILLIAM RAY,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

(June 2, 1986)

Before POLITZ, GARDWOOD, and JOLLY, Circuit Judges.* GARWOOD, Circuit Judge:

---

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Appellant John William Ray was convicted on a three-count indictment for (1) conspiracy to possess cocaine with intent to distribute it, (2) possession with intent to distribute one gram of cocaine, and (3) possession with intent to distribute six ounces of cocaine. The district court sentenced Ray to seven years on count one, the conspiracy count. On each of the two possession counts, Ray was sentenced to seven years and special parole terms of five years to run concurrently with the sentence on count one. Ray appeals his conviction on each count, claiming insufficiency of evidence and the assertedly erroneous admission of a hearsay statement of an alleged co-conspirator. He also challenges the district court's denial of his motion for mistrial based on a witness' indirect reference to his status as a parolee. We affirm the convictions on counts one and two.

Applying the concurrent sentence doctrine, we vacate the conviction on count three.

Facts and Proceedings Below

The convictions of appellant Ray and his co-defendant Pablo Arturo Sandoval resulted from information provided to the Drug Enforcement Agency (DEA) by Edelmiro Molina. In May 1985, Sandoval asked Molina if he knew of a buyer for cocaine. Molina said that he did and contacted DEA agent Jane Herber and told her that Sandoval was interested in selling cocaine. Molina then agreed to cooperate with the DEA in an investigation.

On May 29, 1985, Molina was helping Sandoval load some furniture stored in a trailer owned by Ray, using a truck that Ray had loaned to Sandoval. That day, Molina and Sandoval went to Ray's apartment in San Juan, Texas. Ray and Sandoval left the room where Molina was sitting at the dinner table with Ray's wife and another man. First, Sandoval

returned to the dinner table. Then, Ray came back into the room and tossed a small plastic bag containing white powder onto the table. Ray did not say anything concerning the bag. Molina testified that Sandoval pushed the bag to the side and said that the sample was "for possible sale and testing for customers." Sandoval put the plastic bag in his pocket and he and Molina left the apartment. It was later determined that the bag contained one gram of cocaine.

After leaving Ray's apartment, Sandoval suggested that Molina call the potential buyer. Molina called Herber from a public phone around 12:30 or 1:00 p.m. They agreed to meet in the parking lot of K-Mart store in McAllen, Texas. On the way to the K-Mart, in the truck they had been using to move the furniture, Sandoval handed the plastic bag to Molina, who placed it in his sock. After they arrived at the K-Mart parking lot, Sandoval

became concerned about the presence of local police and suggested that they meet at Cascade Park. Molina got into the car with Herber and they followed Sandoval to the park. At the park, Sandoval got into the front seat of Herber's car. Herber tested the purity of the cocaine and paid Sandoval $105. She then asked Sandoval if he had ten ounces of cocaine for sale. Sandoval said that he was not sure if he could get the cocaine, but agreed to contact Herber within the hour. Herber gave Sandoval an undercover phone number.

Sandoval and Molina returned to Ray's apartment, where Sandoval told Ray that they had a buyer for ten ounces of cocaine. Ray said that he had only three ounces but would try to obtain more. Molina observed Sandoval hand Ray the money that Herber had paid for the cocaine. Ray then gave some of this money back to Sandoval and put the rest in his pocket.

After the discussion at Ray's apartment, Molina went to Herber's office in McAllen to wait for Sandoval's call to the undercover phone line. Sandoval called around 7:00 p.m. and spoke with Molina and Herber. They agreed to meet at the M. Rivas Food Store in Pharr, Texas, at 7:45 p.m. Molina, Herber, and another agent went to this location and waited until 8:15 p.m., but Sandoval did not appear. Later that night, Sandoval came to Molina's house; they went to a public telephone and again contacted Herber. Sandoval said that he was ready to deliver six ounces of cocaine, but Herber suggested that they meet the following morning. Sandoval gave Herber his phone number.

On the morning of May 30, 1985, Herber called Sandoval and said that she was ready to purchase the six ounces. They agreed to meet at the La Plaza Mall. Sandoval went to Molina's house and asked Molina to come to the

mall with him. They left for the mall in the same truck they had used the previous day. First, they went to Sandoval's apartment, where Sandoval picked up a plastic bag, which was later found to contain six ounces of cocaine. Next, they went to a house in McAllen where Sandoval left the bag of cocaine. Molina and Sandoval then went to La Plaza Mall where Sandoval entered Herber's car. Herber showed Sandoval the money for the purchase, which Sandoval counted. Sandoval returned to his truck and told Molina that he would be back in ten or fifteen minutes. Molina stayed at the mall with Herber and the other DEA agent. When Sandoval returned, Molina left to buy a package of cigarettes. Sandoval then handed Herber the six ounces of cocaine. At this point, the agents gave a prearranged signal and surveillance officers moved in and arrested Sandoval.

Ray was arrested on June 19, 1985. He was indicted for conspiracy, with Sandoval, from on or about May 25, 1985 to on or about June 3, 1985, to possess cocaine with intent to distribute it (count one) in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), and 846. The indictment also charged Ray with possession with intent to distribute one gram of cocaine on or about May 29, 1985 (count two), and with possession with intent to distribute six ounces of cocaine on or about May 30, 1985 (count three) in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B). On the possession counts, Ray was also charged with aiding and abetting possession with intent to distribute in violation of 18 U.S.C. § 2. Ray was convicted by a jury on all three counts. The district court sentenced Ray to seven years on count one and seven years and special parole terms of five years on each of counts two and three to run concurrently with the

sentence on count one. He was also fined fifty dollars.

DISCUSSION

Insufficiency of the Evidence

Ray argues that the evidence is insufficient as to each count. In reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to the government and accept all credibility choices and reasonable inferences the jury could have made to support its verdict. United States v. Young Brothers, Inc., 728 F.2d 682, 687 (5th Cir.), cert. denied, 105 S.Ct. 246 (1984); United States v. Bell, 678 F.2d 547, 549 (5th Cir. 1982) (en banc), aff'd, 103 S.Ct. 2398 (1983). As we stated in Bell: "It is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find that the

evidence establishes guilt beyond a reasonable doubt." 678 F.2d at 549 (footnote omitted).

As to the conspiracy count, Ray argues that the government presented no evidence that he had actual knowledge of the conspiracy's existence.

In a conspiracy prosecution under 21 U.S.C. § 846, the government must prove beyond a reasonable doubt the existence of an agreement between two or more persons to violate the narcotics laws, and that each conspirator knew of, intended to join, and participated in the conspiracy. United States v. Prieto-Tejas, 779 F.2d 1098, 1102 (5th Cir. 1986); United States v. Michelena-Orovio, 719 F.2d 738, 742 (5th Cir. 1983) (en banc), cert. denied, 104 S.Ct. 1605 (1984). In a drug conspiracy case, the government is not required to show an overt act in furtherance of the agreement. Prieto-Tejas, 779 F.2d at 1103. The agreement need not be proved by

direct evidence, but may be inferred from a concert of action. Id.; United States v. Vergara, 687 F.2d 57, 60-61 (5th Cir. 1982). The evidence need not demonstrate an express agreement; a tacit agreement with a common design, purpose, and understanding usually will suffice. Prieto-Tejas, 779 F.2d at 1103. Moreover, the defendant's participation and knowledge of the conspiracy may be established by proof of surrounding circumstances. Vergara, 687 F.2d at 61.

The record demonstrates that a reasonable trier of fact could find Ray guilty of conspiracy beyond a reasonable doubt. Molina testified that he saw Ray produce the gram that was eventually sold to Herber. Molina also observed Ray dividing up the proceeds from this sale. In addition, Molina heard Sandoval advise Ray that the buyer was interested in ten ounces of cocaine and Ray's response that he had only three ounces but

that he would attempt to get the remainder. Furthermore, Ray provided the truck in which Sandoval arrived for both meetings with Herber. This evidence is sufficient to allow a reasonable jury to find an agreement between Sandoval and Ray to violate the federal narcotics laws, as well as Ray's participation, knowledge, and intent to join the conspiracy.

Ray alco challenges the sufficiency of the evidence to support his conviction on count two for possession with intent to distribute (or aiding and abetting such possession) one gram of cocaine on May 29, 1985. To establish a violation of 21 U.S.C. § 841(a)(1), the government must prove that the defendant (1) knowingly (2) possessed the controlled substance (3) with intent to distribute it. United States v. Tolliver, 780 F.2d 1177, 1183 (5th Cir. 1986); Prieto-Tejas, 779 F.2d at 1101. The possession may be

actual or constructive; constructive possession is the knowing right to exercise, or exercise of, dominion and control of the substance. Tolliver, 780 F.2d at 1183. Moreover, the possession may be joint among several defendants and may be proved by either direct or circumstantial evidence. Id.

One who aids or abets the commission of a federal offense is punishable as a principal. 18 U.S.C. § 2(a). A charge of aiding and abetting possession with intent to distribute requires proof of aiding and abetting the possession and aiding and abetting the intent to distribute. Tolliver, 780 F.2d at 1184. "To aid and abet, the defendant must willfully associate himself in some way with the criminal venture and willfully participate in it as he would in something he wished to bring about." Id. (quoting United States v. Aguirre Aguirre, 716 F.2d 293, 298 (5th Cir. 1983)).

The evidence is sufficient to support Ray's conviction on count two. The government presented sufficient evidence for a jury to find that Ray had actual possession of the one gram beyond a reasonable doubt. In addition, the jury could reasonably conclude that Ray had the requisite intent to distribute based on Molina's testimony that Sandoval said the gram was for testing and sale to customers and that Ray received the sale's proceeds. Alternatively, this evidence could support a conviction for aiding and abetting possession with intent to distribute one gram of cocaine.

Finding the evidence sufficient on counts one and two, and for the reasons hereinafter stated rejecting Ray's other complaints on appeal, we apply the concurrent sentence doctrine to decline review of the sufficiency of the evidence on count three. Because Ray's sentence on count three is to run concurrently with that on count two, our affirmance of the

conviction on count two makes the review of the count three conviction unnecessary. United States v. Adi, 759 F.2d 404, 409 (5th Cir. 1985); United States v. Montemayor, 703 F.2d 109, 116 (5th Cir.), cert. denied, 104 S.Ct. 89 (1983). This doctrine may not be applied if "there is a significant likelihood that the defendant will suffer adverse collateral consequences." Montemayor, 703 F.2d at 116. Therefore, to avoid such potential adverse collateral consequences, we vacate the conviction on count three. However, our action "in no way alters the jury's verdict or the conviction[].... The effect of this judicial action is to suspend imposition of the sentence[]." Id. (footnote omitted). The suspension of the sentence is subject to later challenge if the government "determines that the interests of justice require reimposition of the sentence." United States v. Cardona, 650 F.2d 54, 58 (5th Cir.

1981). The conviction would then be subject to appellate review. Id.

Co-Conspirator's Statement

Ray also complains of the admission of the hearsay statement of an alleged co-conspirator, asserting there was insufficient independent proof of a conspiracy. At trial, Molina testified that Sandoval had said that the one gram of cocaine obtained from Ray was for sale and testing by customers. Ray argues that this statement was inadmissible in the absence of the district court's finding of independent evidence of a conspiracy.

In United States v. James, 590 F.2d 575 (5th Cir.) (en banc), cert. denied, 99 S.Ct. 2836 (1979), we established procedures and standard for the admissibility of the hearsay statements of one member of a conspiracy offered against another member of the conspiracy under Fed. R. Evid. 801(d)(2)(E).

First, the district court should, "whenever reasonably practicable," require a showing of conspiracy and evidence of a connection between the defendant and the conspiracy before admitting the statements. Id. at 582. This showing is made by "substantial, independent evidence of a conspiracy at least enough to take the question to the jury." Id. at 581 (emphasis in original) (quoting United States v. Nixon, 94 S.Ct. 3090, 3104 n. 14 (1974)). However, the district court may admit the evidence, subject to a later showing of the conspiracy. Id. at 582. Second, "on appropriate motion at the conclusion of all the evidence," id., the court must determine whether the government has shown by a preponderance of the evidence that the conspiracy existed, that the co-conspirator and the defendant were members of the conspiracy, and that the statement was made in the course and in furtherance of the

conspiracy. The government's evidence for this purpose must be independent of the co-conspirator's statement. Id. See also United States v. Acosta, 763 F.2d 671, 678-79 (5th Cir.), cert. denied, 106 S.Ct. 179 (1985).

During a pretrial conference, appellant Ray requested a James hearing. The district court declined to grant a hearing at that time, but agreed to carry the motion along with the case. However, appellant failed to object when Molina gave the hearsay testimony in question, and appellant did not request that the district court make the factual findings required by James at the close of the evidence. Because appellant failed to object to the admission of the hearsay statement or to renew his request for James findings, we must review his challenge under the plain error standard. United States v. DeRoche, 726 F.2d 1025 (5th Cir. 1984). In DeRoche, we

held that, even though the defendant had made a pretrial request for a James hearing, his claim of erroneous admission of a co-conspirator's hearsay statement was subject to review under the plain error standard, because he made no objection to the statement when admitted or at the close of the evidence and he did not renew his original motion for a James hearing. Id. at 1027-28; see also United States v. Nichols, 695 F.2d 86, 91 (5th Cir. 1982) (failure to move for James ruling at close of evidence limits review to plain error).

The district court did not err by refusing to hold a pretrial hearing for a James determination. United States v. Manzella, 782 F.2d 533, 545 (5th Cir. 1986); Montemayor, 703 F.2d at 117. Furthermore, the district court did not commit plain error by admitting the hearsay statement because there was sufficient proof of the conspiracy apart

from Sandoval's statement. Molina's testimony that Ray provided the gram of cocaine to Sandoval, who sold it to Herber, and that Ray and Sandoval divided the proceeds from the sale and discussed obtaining more for a larger sale, provided the requisite proof that a conspiracy existed, that Ray and Sandoval were members of the conspiracy, and that the statement by Sandoval was made in the course and in furtherance of the conspiracy. See, e.g., United States v. Chaney, 662 F.2d 1148, 1153-54 (5th Cir. 1981).

Evidence of Extrinsic Offenses

Finally, Ray argues that the district court erred in denying his motion for mistrial based on a government witness' indirect reference to his status as a parolee. At trial, DEA Agent Herber testified that she had an opportunity to speak to Ray after the events of May 29 and 30, but before his arrest. When the prosecutor asked Herber

where this discussion occurred, Herber responded, "[I]n the office of his parole officer." After appellant objected to this statement, the district court instructed the jury: "[Y]ou are not to take the last statement and consider it for any purpose whatsoever. I want to remind you very emphatically that the defendant is on trial for only what's alleged in the indictment." Appellant then moved for mistrial, which the district court denied.

The language in our opinions concerning the appropriate standard for determining when reference to prior offenses that are not admissible under Fed. R. Evid. 404(b) constitutes harmless error may not be entirely consistent. We have stated that improper references to prior offenses require reversal "only if there is a significant possibility that they had a substantial impact on the jury's verdict." United States v. Kimball,

719 F.2d 1253, 1257 (5th Cir. 1983) (quoting United States v. Klein, 546 F.2d 1259, 1263 (5th Cir. 1977)), cert. denied, 104 S.Ct. 984 (1984); accord United States v. Parry, 649 F.2d 292, 296 (5th Cir. 1981). We have also said that the improperly admitted evidence must be "harmless beyond a reasonable doubt." United States v. Whaley, 781 F.2d 417, 421 (5th Cir. 1985); accord United States v. Martinez, 588 F.2d 495, 499 (5th Cir. 1979). Nevertheless, we need not decide the applicable standard, because, as in United States v. Webster, 750 F.2d 307, 331 (5th Cir. 1984), cert. denied, 105 S.Ct. 2340 (1985), we find the error harmless under either standard. First, the jury was not told anything about the impliedly referenced prior offense. Second, the district court's prompt instruction cured any resulting prejudice. See, e.g., Kimball, 719 F.2d at 1257-58.

CONCLUSION

For the foregoing reasons, we affirm Ray's conviction and sentence for conspiracy to possess with intent to distribute a controlled substance (count one) and for possession of one gram of cocaine with intent to distribute (count two). However, we vacate (and decline to review) Ray's conviction on count three for possession of six ounces of cocaine with intent to distribute.

AFFIRMED in part; VACATED in part.

NO. 85-2700

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPEAL OF CRIMINAL NO.
B-85-346-01-02

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

JOHN WILLIAM RAY, Defendant-Appellant

VS.

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee

APPELLANT'S MOTION FOR REHEARING WITH SUPPORTING AFFIDAVIT

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CERTIFICATE OF INTERESTED PERSONS

In order that the Judges of this Court may evaluate possible disqualification or recusal, the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case:

(1) this cause's defendant-appellant John William Ray; and

(2) Pablo Arturo Sandoval, who was appellant John William Ray's co-defendant in the trial court in its cause no. B-85-346-01-02.

JOSEPH A. CONNORS III and
MATIAS MORIN, JR.

By: _____
JOSEPH A. CONNORS III

Attorneys of Record for
Appellant JOHN WILLIAM RAY

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the Panel decision improperly invoked the concurrent sentence doctrine because:

(a) in this case there is a significant likelihood that by the U.S. Parole Commission's action on this case, appellant will suffer adverse collateral consequences from the unreviewed Count 3 conviction;

(b) appellant is innocent of the Count 3 conviction and, therefore, the overall interest of justice outweighs the policy of judicial convenience; and

(c) appellant has a constitutional due process right to not be incarcerated in part for that Count 3 crime, which the Government failed to prove beyond a reasonable doubt.

BY: _____
JOSEPH A. CONNORS III

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NO. 85-2700

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

JOHN WILLIAM RAY, Defendant-Appellant

VS.

THE UNITED STATES OF AMERICA,

Plaintiff-Appellee

APPELLANT'S MOTION FOR REHEARING
WITH SUPPORTING AFFIDAVIT

STATEMENT OF THE ISSUES

1. The Panel decision improperly invoked the concurrent sentence doctrine because in this case there is a significant likelihood that appellant will suffer adverse collateral consequences from the unreviewed Count 3 conviction.

2. As to its treatment of the count three conviction and sentence herein, the

Panel decision is in direct conflict with this Court's panel decision in United States v. Rubin, 591 F.2d 278 (5th Cir. 1979), after remand, 439 U.S. 810, 99 S.Ct. 67, 58 L.Ed.2d 102 (1978).

3. As to its handling of Count 3, the Panel's decision herein violates appellant's Fifth Amendment rights not to be deprived of liberty without due process of law, in that appellant cannot obtain appellate review of his Count 3 conviction, and must remain incarcerated in part for that Count 3 crime, even though as to that Count 3 the Government failed to sustain its burden of proof beyond a reasonable doubt.

4. The Panel decision improperly invoked the concurrent sentence doctrine because the "qualified" vacation of appellant's Count 3 conviction, like a reversal for reasons other than being not guilty, does not avoid the significant

likelihood that appellant will suffer adverse collateral consequences from the unreviewed conviction since in the Parole Commission's review and use of the "actual offense behavior", the Parole Commission will consider a vacated conviction in determining the parole guidelines and offense severity rating because this Court's vacation of Count 3's conviction and sentence was on grounds not relating to guilt or innocence.

5. The Panel decision improperly invoked the concurrent sentence doctrine because appellant is innocent of the Count 3 conviction and, therefore, the overall interests of justice outweighs the policy of judicial convenience.

STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings and Disposition In the Court Below

On June 18, 1985, two defendants, including this appellant, were originally indicted in a three-count indictment in Cause

No. B-85-346. (R. I-1 and 2.) Its Count 1 alleged a conspiracy from on or about May 25 to on or about June 3, 1985, to possess with intent to distribute a controlled substance; Count 2 alleged possession with intent to distribute one gram of cocaine on May 29, 1985; and Count 3 alleged possession with intent to distribute approximately six ounces of cocaine on May 30, 1985. (R. I-1 and 2.)

On June 27, 1985, appellant pled not guilty to all three counts of the indictment. (R. I-69.) Trial was had before a jury on August 27 and 28, 1985. The jury found appellant guilty of all three counts. (R. I-20; I-3-331 and 332.) On October 2, 1985 (R. I-13; I-3-333), the trial court sentenced appellant to seven years as to Count 1; seven years and five years special parole as to Count 2; and seven years and five years special parole as to Count 3. (R. I-13; I-3-341 and 342.) Written notice of appeal

was filed on October 11, 1985. (R. I-10 to 12.)

Both appellant and the Government timely filed their briefs. On June 2, 1986, a Panel of this Court rendered an opinion affirming in part and vacating in part with qualifications. This Motion For Rehearing was timely filed in this Court's Clerk's office. Appellant is presently incarcerated serving the sentences herein.

Statement of Facts

On appeal appellant prayed that the judgment of conviction and sentence as to each of the indictment's three counts should be reversed and (1) an acquittal ordered because of insufficient evidence to support each conviction; or (2) a retrial ordered because of the error raised in the fourth ground of error. The Government filed its brief, and appellant filed his reply thereto.

On June 2, 1986, a Panel of this Court found the evidence sufficient to support appellant's convictions and sentences on Counts 1 and 2, and rejecting appellant's fourth complaint on appeal, applied the concurrent sentence doctrine to decline review of the sufficiency of the evidence to support the conviction on Count 3. The Court's entire treatment of Count 3 reads (Slip Opinion, pp. 9, 10 and 14, respectively):

"Finding the evidence sufficient on counts one and two, and for the reasons hereinafter stated rejecting Ray's other complaints on appeal, we apply the concurrent sentence doctrine to decline review of the sufficiency of the evidence on count three. Because Ray's sentence on count three is to run concurrently with that on count two, our affirmance of the conviction on count two makes the review of the count three conviction unnecessary. United States v. Adi, 759 F.2d 404, 409 (5th Cir. 1985); United States v. Montemayor, 703 F.2d 109, 116 (5th Cir.), cert. denied, 104 S.Ct. 89 (1983). This doctrine may not be applied if 'there is a significant likelihood that the defendant will suffer adverse collateral consequences.' Montemayor, 703 F.2d at 116. Therefore, to avoid such potential adverse collateral consequences, we vacate the conviction on count three. However, our action 'in no way alters the jury's verdict or the conviction[]

..... The effect of this judicial action is to suspend imposition of the sentence[].' Id. (footnote omitted). The suspension of the sentence is subject to later challenge if the government 'determines that the interests of justice require reimposition of the sentence.' United States v. Cardona, 650 F.2d 54, 58 (5th Cir. 1981). The conviction would then be subject to appellate review. Id."

* * * * *

"Conclusion

"For the foregoing reasons, we affirm Ray's conviction and sentence for conspiracy to possess with intent to distribute a controlled substance (count one) and for possession of one gram of cocaine with intent to distribute (count two). However, we vacate (and decline to review) Ray's conviction on count three for possession of six ounces of cocaine with intent to distribute.

"AFFIRMED in part; VACATED in part."

By so judging, this Court did not review appellant's third ground of error. It reads (Appellant's Brief, p. 2):

> "GROUND OF ERROR NO. 1: The evidence was insufficient to support the jury finding that appellant knowingly or intentionally possessed with intent to distribute approximately six ounces of cocaine as alleged in Count 3 of the indictment herein because the government's evidence failed to prove that appellant ever maintained sole or joint possession of said contraband, and

> appellant's final motion for judgment of acquittal should have been granted. (R. I-3-199, 251.)"

Thus, this Court sidestepped the chance to comply with appellant's request in the conclusion of his Reply Brief. That request reads (Reply Brief, p. 4):

> "At least as to the Count No. Three in the indictment, the judgment of conviction and sentence should be REVERSED with an acquittal ordered as to that third count. A fair but great change in appellant's parole guidelines would result."

Contrary to this Panel decision's above action as to this appellant's insufficiency challenge to Count 3 by his first ground of error, previously this Court, upon directions from the United States Supreme Court, recognized that the concurrent sentence doctrine should not be applied under the circumstances of a case just like appellant's case. See United States v. Rubin, 591 F.2d 278 (5th Cir. Fla. 1979), after remand, 439 U.S. 810, 99 S.Ct. 67, 58 L.Ed.2d 102 (1978).

REHEARING GROUND NO. 1 (Restated)

The Panel decision improperly invoked the concurrent sentence doctrine because in this case there is a significant likelihood that appellant will suffer adverse collateral consequences from the unreviewed Count 3 conviction.

REHEARING GROUND NO. 2 (Restated)

As to its treatment of the count three conviction and sentence herein, the Panel decision is in direct conflict with this Court's panel decision in United States v. Rubin, 591 F.2d 278 (5th Cir. 1979), after remand, 439 U.S. 810, 99 S.Ct. 67, 58 L.Ed.2d 102 (1978).

REHEARING GROUND NO. 3 (Restated)

As to its handling of Count 3, the Panel's decision herein violates

appellant's Fifth Amendment rights not to be deprived of liberty without due process of law, in that appellant cannot obtain appellate review of his Count 3 conviction, and must remain incarcerated in part for that Count 3 crime, even though as to that Count 3 the Government failed to sustain its burden of proof beyond a reasonable doubt.

REHEARING GROUND NO. 4 (Restated)

The Panel decision improperly invoked the concurrent sentence doctrine because the "qualified" vacation of appellant's Count 3 conviction, like a reversal for reasons other than being not guilty, does not avoid the significant likelihood that appellant will suffer adverse collateral consequences from the unreviewed conviction since in the Parole Commission's review and use of the

"actual offense behavior", the Parole Commission will consider a vacated conviction in determining the parole guidelines and offense severity rating because this Court's vacation of Count 3's conviction and sentence was on grounds not relating to guilt or innocence.

REHEARING GROUND NO. 5 (Restated)

The Panel decision improperly invoked the concurrent sentence doctrine because appellant is innocent of the Count 3 conviction and, therefore, the overall interests of justice outweighs the policy of judicial convenience.

ARGUMENT AND AUTHORITIES

In Hirabayashi v. United States, 320 U.S. 81, 63 S.Ct. 1375, 1387, 87 L.Ed. 1774 (1943), the Court held that it was unnecessary to

consider the validity of Hirabayashi's second count conviction for failure to remain in his place of residence in the designated military area between the hours of 8:00 p.m. and 6:00 a.m. on May 9, 1942. The Court reasoned that the 3 month sentence thereon was only concurrent and the Court had concluded to affirm Hirabayashi's first count conviction and its 3 month sentence for defendant's failing to report on May 11 and 12, 1942, contrary to a Civilian Exclusion Order.

In Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 2060-2061, 23 L.Ed.2d 707 (1969), however, the Court not only determined, after reargument, that the concurrent sentence doctrine was not a jurisdictional bar, but also pointed out that the cases revealed no "satisfactory explanation" for the concurrent sentence doctrine, and that there were possibilities of "adverse collateral effects" from a conviction even where the sentence was

concurrent. "The concurrent sentence rule may have some continuing validity as a rule of judicial convenience. That is not a subject we must canvass today, however." Benton v. Maryland, Id. at 89 S.Ct. 2061.

Of course, no one can contradict that because of Count 3, even after vacation, there are serious possibilities of adverse collateral consequences in this case. In this case, the factual collateral consequences include the possibilities that officials or other persons considering appellant's record in the future, whether for purposes of parole, employment, impeachment as witness, etc., will consider the "qualified" vacated conviction. Such possibilities had prior to Benton v. Maryland, supra, resulted in judicial review of convictions even though the sentence had been served. See Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889, 1912, 20 L.Ed.2d 917 (1968): Ginsberg v. New York, 390 U.S. 629, 88

S.Ct. 1274, 1277 n. 2, 20 L.Ed.2d 195 (1968): Pollard v. United States, 352 U.S. 354, 77 S.Ct. 481, 484, 1 L.Ed.2d 393 (1957); Fiswick v. United States, 329 U.S. 211, 67 S.Ct. 224, 230, 91 L.Ed. 196 (1946).

In the case at bar, the Panel decision vacated the Count 3 conviction with the qualification that "the sentence is subject to later challenge [by the Government] if the government 'determines that the interests of justice require reimposition of the sentence". The Panel decision thus runs afoul of Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889, 1899, 20 L.Ed. 917 (1968). Such qualification is an inadequate procedure. It merely postpones appellate review until the Government desires review to effectuate its own interests. Who will look to appellant's interests? Is an original writ of habeas corpus against the warden going to be required so lots more

judicial time is used before Count 3 can be reviewed?

In Benton v. Maryland, supra, at 89 S.Ct. 2061 n. 7, the Court said: "For the reasons there [in Sibron v. New York, supra] stated, an attempt to impose collateral consequences after an initial refusal to review a conviction on direct appeal because of the concurrent sentence doctrine may well raise some constitutional problems. That issue is not, however, presented by this case, and accordingly we express no opinion on it."

Moreover, there is a significant likelihood of adverse collateral consequences in this case. The unreviewed Count 3 conviction will increase the amount of time appellant must serve in prison before he can be paroled. That Count 3 conviction involves 6 ounces of cocaine.

The two amounts of cocaine, which appellant was alleged by indictment to have

possessed, will affect the date on which appellant is paroled. To determine if appellant's assertions are correct, this Court should look to the United States Parole Commission guidelines as it did in United States v. Rubin, 591 F.2d 278, 281 (5th Cir. Fla. 1979), cert. denied, 444 U.S. 864, 100 S.Ct. 133, 62 L.Ed.2d 87 (1979). There this Court said (footnote omitted):

> "To determine if Rubin's assertions are correct, we look to the United States Parole Commission guidelines. The Parole Commission uses these guidelines to determine how long a prisoner serves before being released on parole. See 18 U.S.C. § 4206 (1976); 28 C.F.R. § 2.20 (1978). Although the Parole Commission may depart from its guidelines '[w]here the circumstances warrant,' 28 C.F.R. § 2.20(c) & (d) (1978), it almost always follows them in any given case. See, e. g., Ruip v. United States, 555 F.2d 1331, 1333 (6th Cir. 1977); United States v. Salerno, 538 F.2d 1005, 1007 (3d Cir. 1976). Under the guidelines, the customary length of time an offender serves is determined in part by the offense severity rating the Parole Commission assigns to the offense or offenses for which a prisoner is incarcerated."

The severity rating for the offense of possession of a controlled substance is based on the amount of controlled substance possessed. The range of possible classifications are Category 1 to Category 8. For instance, [as appellant understands] if an offender's case involves 100 to 1000 grams, that offender is placed in category 5 and on a seven year sentence will be eligible for parole in 48 to 60 months. On the other hand, [as appellant understands] if an offender's case involves 1 gram or less, that offender is placed in Category 2 and on a seven year sentence will be eligible for parole in 12 to 16 months.

"In assigning this severity rating, the Parole Commission looks to the 'actual offense behavior' that can reliably be established. United States Parole Commission Research Unit, Guideline Application Manual (Nov. 1977). Since the offenses for which the prisoner is

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
OCT 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-281

In the Supreme Court of the United States

OCTOBER TERM, 1986

JOHN WILLIAM RAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-281

JOHN WILLIAM RAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was prejudiced by the court of appeals' application of the concurrent sentence doctrine to vacate one of his three convictions.

1. Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846; possession of one gram of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); and possession of six ounces of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Petitioner was sentenced to concurrent seven-year prison terms on each of the three counts and to concurrent five-year special parole terms on the two substantive counts.

The evidence adduced at trial showed that in May 1985 petitioner's co-defendant Pablo Arturo Sandoval asked Edelmiro Molina whether Molina knew anyone who was interested in buying cocaine. Molina, who was an informant for the Drug Enforcement Administration, contacted DEA agent Jane Herber, informed her of the conversa-

tion, and agreed to cooperate with the DEA in its investigation of Sandoval. Molina and Sandoval went to petitioner's apartment on May 29, 1985. Petitioner and Sandoval left the main room of the apartment, and petitioner returned carrying a small plastic bag that contained one gram of cocaine. Sandoval explained that the cocaine was a sample for sale and testing by customers. Molina called Agent Herber, who was posing as a cocaine buyer; Molina and Sandoval drove to meet Herber and Herber purchased the sample of cocaine for $105. Pet. App. A5-A7.

At the time she purchased the sample, Agent Herber told Sandoval that she was interested in buying 10 ounces of cocaine. Sandoval and Molina then returned to petitioner's apartment, and Sandoval handed petitioner the money Herber had paid for the cocaine sample. Petitioner gave some of that money back to Sandoval. Sandoval told petitioner that the buyer wanted to obtain 10 ounces of cocaine. Petitioner replied that he had only three ounces of cocaine on hand but that he would try to obtain more. Several hours later, Sandoval telephoned Herber and told her that he was ready to deliver six ounces of cocaine; the two agreed to meet the next day. Sandoval, driving petitioner's truck, picked up Molina and stopped at Sandoval's apartment to get the six ounces of cocaine. Sandoval and Molina met Agent Herber, Sandoval handed Herber the six ounces of cocaine, and Sandoval was arrested. Petitioner was arrested approximately three weeks later. Pet. App. A7-A10.

The court of appeals affirmed petitioner's conspiracy conviction and his conviction for possession of one gram of cocaine. It found that there was sufficient evidence to support those convictions (Pet. App. A11-A16), and it rejected petitioner's challenges to two of the district court's evidentiary rulings (*id.* at A18-A24). With respect to the conviction for possession of six ounces of cocaine, the

court "appl[ied] the concurrent sentence doctrine to decline review of the sufficiency of the evidence" (*id.* at A16). The court observed that the sentences on the two possession counts were concurrent and that its "affirmance of the conviction on [one of the possession counts] makes the review of the [second possession] conviction unnecessary" (*id.* at A16-A17). In order "to avoid * * * potential adverse collateral consequences," the court vacated petitioner's second possession conviction (*id.* at A17).

2. Petitioner argues (Pet. 22-38) that this Court should abolish the concurrent sentence doctrine. However, this case presents no question regarding the validity of that doctrine.[1]

The concurrent sentence doctrine provides that when a defendant receives concurrent sentences for two convictions and one of the convictions is upheld, a court need not review the conviction on the other count, because the conviction on one count is sufficient to sustain the

---

[1] Contrary to petitioner's assertions (Pet. 14-17) regarding the merits of the sufficiency issue that the court of appeals declined to address, it is not at all clear that the evidence was insufficient to support the second possession conviction. Petitioner plainly was involved in a conspiracy to sell cocaine—the jury convicted petitioner on the conspiracy charge and the court of appeals affirmed that conviction. The facts supporting the conspiracy conviction also support the conviction on the second possession count. Petitioner provided the sample of cocaine that Sandoval—petitioner's co-conspirator—sold to Agent Herber. Sandoval gave petitioner the money derived from the sale of the sample and petitioner—apparently the leader of the conspiracy—divided the proceeds. When Agent Herber indicated that she wanted to purchase 10 ounces of cocaine, Sandoval asked petitioner for the drugs. Petitioner replied that he had only three ounces, but he promised to try to get more; hours later, Sandoval had obtained six ounces of cocaine. Sandoval used petitioner's truck to deliver the drugs to Herber the following day. In view of the dealings between petitioner and Sandoval, the jury could reasonably conclude that the six ounces of cocaine had been provided by petitioner.

sentence. *Hirabayashi* v. *United States,* 320 U.S. 81, 105 (1943); see also *United States* v. *Romano,* 382 U.S. 136, 138 (1965); *Lawn* v. *United States,* 355 U.S. 339, 359 (1958); *Locke* v. *United States*, 11 U.S. (7 Cranch) 339, 344 (1813). The unreviewed conviction therefore is affirmed. See, *e.g., Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973). This Court has indicated, however, that affirmance of the unreviewed conviction may not be appropriate if the defendant would suffer adverse consequences as a result of the additional, unreviewed conviction. *Benton* v. *Maryland,* 395 U.S. 784, 790-792 (1969).[2]

[2] The courts of appeals generally have concluded that the concurrent sentence doctrine may be utilized if the defendant will not suffer adverse collateral consequences as a result of the affirmance of the unreviewed conviction. See *United States* v. *Gordon,* 634 F.2d 639, 643 (1st Cir. 1980); *United States* v. *Lampley,* 573 F.2d 783, 788 (3d Cir. 1978); *United States* v. *Truong Dinh Hung,* 629 F.2d 908, 931 (4th Cir. 1980) (Russell & Hall, JJ., concurring and dissenting), cert. denied, 454 U.S. 1144 (1982); *United States* v. *Mullens,* 583 F.2d 134, 142 (5th Cir. 1978); *United States* v. *Grunsfeld,* 558 F.2d 1231 (6th Cir.), cert. denied, 434 U.S. 872 (1977); *United States* v. *Smith,* 601 F.2d 972, 973 (8th Cir.), cert. denied, 444 U.S. 879 (1979); *United States* v. *Hopkins,* 716 F.2d 739, 749 (10th Cir. 1982); *United States* v. *Johnson,* 700 F.2d 699, 701 (11th Cir. 1983). The Second Circuit has placed the burden on the government to show the absence of adverse collateral consequences. *United States* v. *Vargas,* 615 F.2d 952, 960 (2d Cir. 1980). Under the Seventh Circuit rule, the absence of collateral consequences will be found only in rare situations. *United States* v. *Peters,* 617 F.2d 503, 506 (7th Cir. 1980); *United States* v. *Tanner,* 471 F.2d 128, 140, (7th Cir.), cert. denied, 409 U.S. 949 (1972).

The Ninth Circuit, the District of Columbia Circuit, and some panels of the Fifth Circuit have refused to apply this rule to affirm convictions. In their view, the task of determining whether a defendant will suffer adverse consequences is too difficult and time consuming to result in any gain in judicial efficiency. *United States* v. *De Bright,* 730 F.2d 1255 (9th Cir. 1984); *United States* v. *Hooper,* 432 F.2d 604 (D.C. Cir. 1970); *United States* v. *Diaz,* 733 F.2d 371, 376 (5th Cir. 1984). The Ninth Circuit has held that the merits of a defendant's claim must be decided in every case; the District of Columbia Circuit and some panels in the Fifth Circuit have adopted the practice of vacating the unreviewed convictions.

In this case, the court of appeals applied a variant of the concurrent sentence doctrine under which the unreviewed conviction is vacated, rather than affirmed, in order to "avoid * * * potential adverse collateral consequences" (Pet. App. A17). This case therefore does not present any issue regarding the propriety of the affirmance of an unreviewed conviction under the concurrent sentence doctrine. Indeed, petitioner should not be heard to complain about a rule that provided him with essentially the same relief that he would have received if his challenge to the conviction had been successful on the merits.[3]

3. Petitioner claims (Pet. 18-22, 36-38) that he was prejudiced because the court of appeals' failure to address the merits of his challenge to the vacated conviction deprived him of an opportunity to reduce the severity classification of his offense under the guidelines utilized by the United States Parole Commission. He asserts that the court of appeals' action may have increased the length of his term of incarceration. This fact-bound contention is wholly without merit.

[3] Petitioner cites (Pet. 11-13) our filing in *United States* v. *Rubin,* 439 U.S. 810 (1978), and implies that our position in that case precludes us from defending the decision below. The court of appeals in *Rubin* applied the concurrent sentence doctrine to *affirm* the unreviewed convictions. Here, by contrast, the court of appeals *vacated* the unreviewed conviction. Since petitioner has not been burdened with an unreviewed conviction that was nonetheless affirmed by the court of appeals, *Rubin* is irrelevant to this case. Our brief in *Mariscal* v. *United States,* 449 U.S. 405 (1981), also is inapposite. In that case, as in *Rubin,* the court of appeals had affirmed the defendant's convictions on the counts in dispute. We argued in *Mariscal* (80-5618 Memo in Opp. at 2-4) that the application of the concurrent sentence doctrine was appropriate because the defendant would not suffer adverse collateral consequences as a result of the court of appeals' affirmance of the unreviewed convictions.

Petitioner asserts (Pet. 18) that "the effect of the unreviewed count * * * is to raise the severity of petitioner's offense [under the Parole Commission guidelines] from Category 3 * * * to Category 5" because, in petitioner's view, the Parole Commission would have been barred from considering the evidence relating to the six ounces of cocaine if the court of appeals had found that the evidence was not sufficient to support the second possession conviction. In fact, the Commission would be free to consider that evidence in connection with the conspiracy conviction regardless of the disposition of the possession count. The court of appeals' failure to review the merits of petitioner's challenge to the possession conviction is therefore irrelevant to the severity classification accorded to petitioner's offense.

The Parole Commission's guidelines provide that the severity classification of a conspiracy conviction depends upon the "underlying offense." 28 C.F.R. 2.20, Guideline 101. The conspiracy charge in the indictment in the present case does not specify a quantity of cocaine but states that the conspiracy extended from May 25 to June 3, a time period encompassing both of the sales of cocaine to Agent Herber. Since evidence of both cocaine sales was relevant to the conspiracy conviction, the Parole Commission could consider all of that evidence in assessing the severity of the conspiracy offense.[4] Therefore, even if the court of appeals had found insufficient evidence to support the second possession conviction, the Parole Commission still would have been able to assess the severity of the conspiracy offense by reference to the evidence that petitioner was involved in the sale of six ounces of cocaine. *DiNapoli* v. *United States Parole Comm'n*, 538 F. Supp. 658, 663 (M.D. Pa.), aff'd by order, 676 F.2d 684 (3d Cir. 1982)(Table). The court of appeals' decision not to address the merits of petitioner's challenge to his second possession conviction therefore could not have affected the timing of petitioner's release from prison.

[4] On September 18, 1986, the Parole Commission's National Appeals Board rejected petitioner's claim that his offense had been incorrectly assigned a category 5 severity rating. The Board stated that "[t]he record reflects that you were convicted on all three counts of the indictment, said sentences to run concurrent to each other. The total amount of drugs involved in your case was 154 grams of 100% pure cocaine. Your offense severity was accurately assessed pursuant to 28 C.F.R. Section 2.20(921)(F)."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

OCTOBER 1986

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PETITIONER'S

BRIEF

BRF112

NO. 86-281

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

JOHN WILLIAM RAY,
Petitioner

VS.

UNITED STATES OF AMERICA,
Respondent

On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR PETITIONER RAY

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PETITION FOR CERTIORARI FILED AUGUST 20, 1986
CERTIORARI GRANTED NOVEMBER 17, 1986

BEST AVAILABLE COPY

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QUESTION PRESENTED

1. Whether the Court of Appeals properly applied the concurrent sentence doctrine to refuse review of petitioner's conviction under Count 3 of his indictment charging possession with intent to distribute six ounces of cocaine where:

(a) the evidence was clearly insufficient to support the jury's guilty verdict on that charge; and

(b) the Parole Commission will use that conviction to set the severity rating of petitioner's overall "actual offense behavior", and thus automatically increase his time of incarceration before his parole eligibility.

LIST OF ALL PARTIES BELOW

The original parties before the United States Court of Appeals for the Fifth Circuit were: The United States of America, Petitioner John William Ray and his co-defendant at trial Pablo Arturo Sandoval. The court of appeals dismissed Sandoval's appeal upon his own motion.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not previously come before this Court. The undersigned counsel for Ray is not aware of any other related case pending before this Court.

IDENTITY OF COUNSEL BELOW

Ray was represented at trial by attorney Matias Morin, Jr. Joseph A. Connors III joined trial court in representing petitioner in the court of appeals.

AUSA Robert Guerra represented The United States of America at trial. AUSA James R. Gough and Henry K. Oncken, U.S. Attorney for the Southern District of Texas, briefed the Government's case in the court of appeals.

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TO THE HONORABLE SUPREME COURT:

John William Ray petitions for review of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The district court's judgment is unreported. The Fifth Circuit's opinion (Pet.App.A-3 to 25[1]) is also unreported but noted. United States v. Sandoval, 791 F.2d 929.

JURISDICTION

The court of appeals had jurisdiction of petitioner's direct appeal by virtue of 28 U.S.C. 1291. It entered its opinion on June 2, 1986. (Pet.App.A-3.) That court denied Ray's timely petition for rehearing on June 25, 1986. (Pet.App.A-56.) His motion for

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[1] The Appendix to the petition for writ of certiorari will be cited as "Pet.App.A-__". Record citations will be "1R-__" for the Clerk's transcript and "2R-__" (pp. 2 to 173) and "3R-__" (pp. 174 to 346) for the two volumes of the Reporter's transcript of testimony.

leave to file an amended petition for panel rehearing was denied on July 14, 1986. (Pet.App.A-63.) The petition for writ of certiorari was filed on August 20, 1986, and granted on November 17, 1986. Ray v. United States, ____ U.S. ____, 107 S.Ct. 454, ____ L.Ed.2d ____ (1986). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, REGULATION AND RULE PROVISIONS

The Constitution's Fifth Amendment reads:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The applicable statutes, regulations and

rules are printed in the appendix at the conclusion of this brief. They are: 18 U.S.C. 2, 3231, 4205, 4506 and 4207; 21 U.S.C. 812, 841 and 846; 28 U.S.C. 541, 547, 1254(1), 1291 and 2111; Fed.R.Cr.Proc. rule 52; 28 C.F.R. 2.19(c), 2.35, 2.20 and its Chapters 1, 9 and 13; rules 28 C.F.R. 2.2(a), 2.20's Guidelines For Decision Making, and 2.20-04 to 2.20-05.

STATEMENT OF THE CASE

A. Procedural History

On June 18, 1985, petitioner John William Ray and his co-defendant Pablo Arturo Sandoval were charged with three violations of the narcotics laws of the United States. (1R-1, 2.) The United States District Court for the Southern District of Texas had jurisdiction under 18 U.S.C. 3231. Count 1 of the indictment alleged that from on or about May 25, 1985, to on or about June 3, 1985, each defendant knowingly and intentionally did

conspire with each other and unknown persons to unlawfully possess, with intent to distribute, a quantity of cocaine, in violation of 21 U.S.C. 846, 841(a)(1) and 841(b)(1)(B). Count 2 alleged that each defendant knowingly and intentionally possessed, with intent to distribute, approximately one gram of cocaine on or about May 29, 1985, in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(B) and 18 U.S.C. 2. Count 3 alleged that each defendant knowingly and intentionally possessed, with intent to distribute, approximately six ounces of cocaine on or about May 30, 1985, in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(B) and 18 U.S.C. 2. (1R-1, 2.)

Ray pled not guilty to all three counts of the indictment on June 27, 1985. (1R-69.) After trial on August 27 and 28, 1985, however the jury found both defendants guilty of all charges. The trial court sentenced Ray to

seven years incarceration on each conviction and special parole terms of five years on the second and third counts. (1R-13,20; 3R-331 to 333, 341, 342.) Ray's notice of appeal was timely filed. (1R-10 to 12.) He is incarcerated serving those sentences.

B. How the Fifth Circuit Avoided The Federal Ouestions Presented Below

On January 14, 1986, Ray timely filed his appellate brief challeging the sufficiency of the evidence supporting his three convictions. Ray represented (Appellant's Brief at pp. 21-22):

> "This Court sometimes has a concurrent sentence doctrine. See United States v. Littrell, 574 F.2d 828, 830 (5th Cir. 1978); United States v. Ashley, 569 F.2d 975, 984 (5th Cir. 1978). Appellant submits that this doctrine is not applicable to this case because: (1) the evidence of appellant's guilt of the charged offenses is not overwhelming; and (2) [as appellant understands] the federal parole board's guidelines categorize drug offenders' eligibility for parole according to the amount of grams involved in the particular offender's case. For instance, [as appellant understands] if an offender's case involves 100 to 1000 grams, that

offender is placed in category 5 and on a seven year sentence will be eligible for parole in 48 to 60 months. On the other hand, [as appellant understands] if an offender's case involves 1 gram or less, that offender is placed in Category 2 and on a seven year sentence will be eligible for parole in 12 to 16 months."

In affirming the judgment below, the court of appeals declined review of the insufficiency challenge to Count 3, saying (Slip Opinion, pp. 9 and 10; Pet.App.A-16 to 18):

"Finding the evidence sufficient on counts one and two, and for the reasons hereinafter stated rejecting Ray's other complaints on appeal, we apply the concurrent sentence doctrine to decline review of the sufficiency of the evidence on count three. Because Ray's sentence on count three is to run concurrently with that on count two, our affirmance of the conviction on count two makes the review of the count three conviction unnecessary. United States v. Adi, 759 F.2d 404, 409 (5th Cir. 1985); United States v. Montemayor, 703 F.2d 109, 116 (5th Cir.), cert. denied, 104 S.Ct. 89 (1983). This doctrine may not be applied if 'there is a significant likelihood that the defendant will suffer adverse collateral consequences.' Montemayor, 703 F.2d at 116. Therefore, to avoid such potential adverse collateral consequences, we vacate the conviction on count three. However, our action 'in no

way alters the jury's verdict or the conviction[] . . . . The effect of this judicial action is to suspend imposition of the sentence[].' Id. (footnote omitted). The suspension of the sentence is subject to later challenge if the government 'determines that the interests of justice require reimposition of the sentence.' United States v. Cardona, 650 F.2d 54, 58 (5th Cir. 1981). The conviction would then be subject to appellate review. Id."

Ray timely filed a motion for rehearing with supporting affidavit, contending (Pet.App.A-26 to 55):

"1. The Panel decision improperly invoked the concurrent sentence doctrine because in this case there is a significant likelihood that appellant will suffer adverse collateral consequences from the unreviewed Count 3 conviction.

"2. As to its treatment of the count three conviction and sentence herein, the Panel decision is in direct conflict with this Court's panel decision in United States v. Rubin, 591 F.2d 278 (5th Cir. 1979), after remand, 439 U.S. 810, 99 S.Ct. 67, 58 L.Ed.2d 102 (1978).

"3. As to its handling of Count 3, the Panel's decision herein violates appellant's Fifth Amendment rights not to be deprived of liberty without due process of law, in that appellant cannot obtain appellate review of his Count 3 conviction, and must remain incarcerated

in part for that Count 3 crime, even though as to that Count 3 the Government failed to sustain its burden of proof beyond a reasonable doubt.

"4. The Panel decision improperly invoked the concurrent sentence doctrine because the "qualified" vacation of appellant's Count 3 conviction, like a reversal for reasons other than being not guilty, does not avoid the significant likelihood that appellant will suffer adverse collateral consequences from the unreviewed conviction since in the Parole Commission's review and use of the 'actual offense behavior', the Parole Commission will consider a vacated conviction in determining the parole guidelines and offense severity rating because this Court's vacation of Count 3's conviction and sentence was on grounds not relating to guilt or innocence.

"5. The Panel decision improperly invoked the concurrent sentence doctrine because appellant is innocent of the Count 3 conviction and, therefore, the overall interests of justice outweighs the policy of judicial convenience."

That motion's supporting affidavit read (Pet.App.A-52 to 54):

"COUNTY OF HIDALGO § AFFIDAVIT

THE STATE OF TEXAS §

"Before me, the undersigned authority, a Notary Public, in and for the State of Texas,

on this day personally appeared JOSEPH A. CONNORS III, who after being by me duly sworn, upon his oath deposes and says:

> "On June 9, 1986, I, Joseph A. Connors III, called the United States Parole Commission at (214) 767-0024 in Dallas, Texas. I was trying to learn of any parole ramifications that may have been missed by the United States Court of Appeals for the 5th Circuit. I was afraid that in considering the 'overall criminal behavior,' the Parole Commission would definitely consider the vacated conviction in Count 3 of his indictment, in deciding whether to grant parole to Mr. John William Ray. I spoke with Parole Hearing Examiner Slaughter. Mr. Slaughter spoke to me in generalities and explained that the Parole Commission does not investigate but uses the total offense information contained in the pre-sentence investigation report. Mr. Slaughter told me that unless a court says that "this crime did not happen or an acquittal is entered on this count," the Parole Commission would go by whatever is included in the trial court's pre-sentence investigation report concerning that count. Thus, it is obvious to me that my client, Mr. Ray, will suffer serious parole consequences because of the vacated Count 3 conviction, since the Fifth Circuit Court failed to decide whether the evidence is sufficient to support that count."

/s/ Joseph A. Connors III
AFFIANT - JOSEPH A. CONNORS III

"SWORN TO AND SUBSCRIBED before me on this 12th day of June, 1986.

/s/ Rosario Chapa
Notary Public In and For
The State of Texas"

The court of appeals denied that Motion For Rehearing on June 25, 1986. (Pet.App.A-56.) On June 24, 1986, counsel for Ray first became aware of United States v. Escobar DeBright, 730 F.2d 1255, 1257-1260 (9th Cir. 1984) (en banc). Upon learning of Escobar DeBright, Ray's counsel promptly mailed Ray's Motion For Stay of Mandate, Amended Motion For Rehearing, and Motion For Court To Enlarge Time For Appellant To File An Amended Motion For Rehearing. (Pet.App.A-57 to 62.) Those motions were denied on July 14, 1986. (Pet.App.A-63.)

C. Statement Of The Facts

Viewing the evidence and all reasonable inferences which may be drawn therefrom in the light most favorable to the government, Glasser v. United States, 315 U.S. 60, 62

S.Ct. 457, 86 L.Ed. 680 (1942), these convictions resulted from a "buy" from petitioner's co-defendant Sandoval of, first, a sample and then a six ounce quantity of cocaine by Drug Enforcement Administration Special Agent Jane Ann Herber, acting undercover. Sandoval did the negotiating and delivered the drugs. The transactions came about through information furnished to Agent Herber by a confidential informant named Edelmiro Molina. Sandoval was the "live-in boyfriend" of Molina's cousin, Sylvia Garza. Sandoval asked Molina if the latter knew any possible customer for a drug sale. Molina secretly advised Agent Herber, and, following her instructions, brought about a series of telephone contacts and meetings between Agent Herber, posing as "Jenny", and Sandoval which culminated in the sale to her by Sandoval of, first, a sample and then a six ounce quantity. There is some evidence that Ray supplied the

sample of narcotics. This resulted in the arrest of Sandoval and the prosecution of him and Ray. In greater detail, the jury trial evidence shows these events occurred.

The prosecution presented its evidence. (2R-28 to 173; 3R-174 to 196.) The defense presented its evidence. (3R-207 to 249.) There was no rebuttal.

D. The Government's Case

On May 29, 1985, Edelmiro Molina contacted Agent Jane Ann Herber at about 9:15 or 9:30 a.m. Herber talked to Molina again at about 1:20 or 1:30 p.m. At approximately 2:05 p.m., Pablo Arturo Sandoval and Molina momentarily met Herber at the K-Mart store parking lot in McAllen. (2R-31.) Sandoval and Molina were in a bronze 1971 Ford pickup truck. (2R-32, 33.) Molina "got off" the pickup truck, spoke with Herber, and the two left the K-Mart parking lot following the pickup truck in Herber's car. (2R-34.) En

route, Molina gave Herber a little plastic bag containing white powder. They stopped at the Cascade Pool, and Sandoval got into Herber's car. Herber was introduced as "Jenny" and Sandoval as "Art". The sample of cocaine and a future purchase were discussed. Herber paid Sandoval $105 for the gram sample. (2R-35, 36.) Concerning future purchases, Herber asked Sandoval how much he could provide. Sandoval asked how much Herber wanted. Herber said she had been led to believe Sandoval had ten ounces. Sandoval said he had to check how much he had left. Sandoval said within an hour he would let Herber know. Sandoval said the cocaine's purity should be ninety percent or better. (2R-37.) Sandoval and Molina left in Sandoval's vehicle. Herber went to her office to wait for the phone call. Sandoval called at approximately 3:30 p.m. Sandoval said he had six ounces and wanted $1950 per ounce. Herber said she would like to buy the

six ounces. At 7:00 p.m., Sandoval called again and asked Herber if she had the money. Herber said yes, and they agreed to meet at 7:45 p.m. in the parking lot of M. Rivas Food Store in Pharr. Herber, Molina and Special Agent Michael Harper arrived there at approximately 7:40 p.m. Herber had surveillance officers present both at the first meeting at K-Mart and at the M. Rivas Food store meeting. They stayed at the latter until approximately 8:15 p.m. Then everyone went home because Sandoval did not appear. Herber took Molina home. (2R-41 to 44.) Later, at 10:30 p.m., Molina called Herber. On the same call, Herber talked to Sandoval. Herber refused to meet with Sandoval that late at night. Herber got Sandoval's telephone number (787-5892) to call him the next morning. The next day, May 30, Herber called at approximately 10:30 a.m. 787-5892 was registered to Ida G. Garza at 467 Sunset

Terrace, Pharr, Texas. Herber asked Sandoval if he still had the six ounces. Sandoval said yes. Sandoval needed to see the money first. Herber said fine. So they agreed to meet at the La Plaza Mall at 11:30. There was surveillance there too. Sandoval arrived at 11:35 a.m. (2R-45 to 47.) Molina was with him. They were in the same bronze 1971 Ford pickup. Sandoval got in the back seat of Herber's car. He counted the money and left to go get the "stuff." Molina stayed with Herber and Harper. (2R-48.) In ten minutes, Sandoval returned and gave Herber approximately six ounces of white powder. (2R-49.) The pre-arranged arrest signal was given and Sandoval was placed under arrest. (2R-50.) Herber talked to petitioner Ray around June 3 or 4 of 1985 (2R-67), at the office of Ray's parole officer. (2R-52.) Ray indicated to her that an individual had left the pickup with him. Ray had thought about

purchasing it but had not done so in fact. Ray had had it for two or three months and had lent it to one of his wife's employees and at sometime around Memorial day weekend to "Tutti".[2] (2R-56, 57.) By investigation, Herber determined that the truck belonged to Troy Tanner. (2R-66.) Ray never claimed to be the owner of the truck. Herber never physically received any cocaine from Ray, nor did any of her agents. Ray had none with him when arrested. Molina was paid $1,500 after Sandoval was arrested. (2R-68, 69.) Herber could not say whether she or the surveillance officer saw Ray at any of the surveillance locations. Herber attempted to get Ray's fingerprints from Government Exhibit Two, the six ounces of cocaine, but was unable to find any fingerprints. (2R-70, 71.) On June 18, 1985, Ray was indicted and he was arrested the

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[2] This was a nickname for Sandoval. (2R-68.)

next morning. After the delivery of Government Exhibit Two, the six ounces of cocaine, Sandoval's arrest prevented him from paying his second supplier. (2R-71, 72.) After Herber was "stood up" on May 29 at the M. Rivas Food Store, it was Molina who called Herber.

Edelmiro Molina testified that he had previously been convicted for burglary of a building, burglary of a habitation, and aggravated robbery. (2R-76, 77, 115, 116.) On May 27, 1985, Sandoval asked him to help move some furniture. (2R-81.) The furniture was stored in a trailer owned by John. John also loaned Sandoval the truck. Molina did not go with Sandoval to get the truck. Molina did not see the truck until May 28th. (2R-82.) He went over to Sandoval's place around 9:00 a.m. and started loading the furniture. During this time, Sandoval asked Molina if he could get a buyer to make a

cocaine deal. (2R-83.) Molina called Herber from his home May 28, 1985 around 9:00 a.m. He said he would call back an hour later. Molina did not call back because he did not have time. After the furniture was unloaded, Molina and Sandoval went to John's apartment in San Juan. (2R-84, 85.) Molina had been to John's apartment once before during that week, but did not go inside the building. Molina identified Ray as John. (2R-86.) On May 28th, Sandoval and Molina went into Ray's apartment and sat at the dinner table. (2R-87.) Ray's wife and a man by the name of "Rick" were there. Sandoval and Ray discussed something for about five minutes, but Molina could not hear because they went into another room. Then Sandoval came back and sat at the table. Ray then came back and tossed on the table a small plastic bag with white powder in it. Ray did not say anything. Sandoval pushed the small bag to the side. Sandoval

later told Molina that was supposed to be for possible sale and testing for customers. They sat there and talked some more. Rick, the other guy there present, was talking about selling a ring or something. Altogether, they were there forty minutes. Then Molina and Sandoval left. Sandoval placed the little packet in his pocket. (2R-88, 89.) Sandoval suggested that Molina call the person that wanted to buy the coke, which Molina did from a public phone. This was around 12:30 or 1:00. Herber suggested the K-Mart in McAllen for a meeting. Molina told Sandoval and they went there. (2R-90.) At the K-Mart parking lot, Sandoval gave Molina the package and Molina put it in his sock. (2R-91.) Sandoval saw a city policeman there and suggested that they should go and meet at the Cascade Park. Molina went with Herber and they followed Sandoval. At the park, Sandoval sat in the front seat of Herber's car. Herber and

Sandoval discussed the gram and Herber tested it for purity. There was talk about possibly getting ten ounces of cocaine. (2R-92 to 94.) The price for the gram was $105. It was finally decided that Molina would contact Herber again later. Molina and Sandoval went back to San Juan to the same apartment where they had picked up the little package. They went inside and Ray and his wife were there. (2R-95, 96.) Sandoval advised Ray about this person that was willing to buy ten ounces of coke, "... and that this person was requesting ten ounces and they weren't sure if they could come up with the ten ounces but they had three ounces is what I heard John say and that they would have to go back and see if they could get the rest of it." At that point, Molina saw Sandoval hand to Ray the money that had been handed to him by Herber for the coke. Petitioner Ray put it in his pocket and gave some to Sandoval. (2R-97.) After about

thirty minutes, Sandoval and Molina left together. Molina noticed petitioner Ray and his wife leave on two different "motor bikes". Sandoval dropped Molina off at his house. Molina got on the phone back to Herber. Herber said she wanted to talk to Molina and asked where she could pick him up. (2R-98.) Molina went to Herber's office in McAllen to wait there for a call from Sandoval. Sandoval called around 7:00 p.m. and Molina talked to him briefly. Molina then passed the phone to Herber, who also talked to Sandoval. After that, Molina learned they were supposed to go to the M. Rivas Food Store in Pharr at 7:45 p.m. Molina, Herber and agent Parker went there and waited until 8:15 p.m. (2R-99, 100.) Sandoval did not show up. Then Molina was dropped off at his house. At about 10:00 p.m., Sandoval was seen behind Molina's house going through the alley in a different vehicle driven by another person. Sandoval told

Molina he had the merchandise and for Molina to get in touch with Herber. They drove to Rick's Quick Stop in Pharr and Molina contacted Herber from the public telephone outside. Molina handed the phone to Sandoval. After hanging up, Sandoval told Molina they would see each other the next day at 10:00 a.m. (2R-101, 102.) The next day, around 11:00 a.m., Sandoval drove up in the truck as though he were looking for Molina. (2R-103.) Sandoval asked Molina to go with him to La Plaza Mall. On the way, they stopped by Molina's cousin's apartment. They went inside and Sandoval pulled out from a drawer a manila envelope containing a clear plastic bag which Sandoval said contained six ounces of coke. Sandoval wrapped it in newspaper. Then they walked outside and Sandoval placed the newspaper under the front seat of the driver's side. (2R-104, 105.) Before going to La Plaza Mall, they went to a house in an area in

McAllen called La Paloma. Sandoval dropped off the "stuff" there for safekeeping. Sandoval wanted to count the money first. (2R-106.) Then they went to La Plaza Mall. Herber and Michael Harper were waiting. Sandoval got in the back of their car. Molina happened to look from the truck to Herber's car and saw what seemed like a bank bag, with Sandoval counting. Molina did not see the money. Then Sandoval came to his truck and told Molina he would be back in ten or fifteen minutes. Molina stayed with Herber and Harper. When Sandoval came back, Molina was sent to buy a pack of cigarettes. Shortly thereafter Sandoval was arrested. (2R-107 to 109.)

When Molina first discussed with Sandoval his ability to find cocaine, Molina did not have an idea from where Sandoval was getting cocaine. On May 27, 1985, Molina first became aware that Ray might be the source of

Sandoval's supply. (2R-110.) The following day was when the gram was sold. When Sandoval was arrested, Molina was given $1,500. Molina said he had not made any deals for coming in to testify to get himself "off the hook" concerning other charges he might have. (2R-111, 112.) Molina had two forgery cases pending in Hidalgo County, Texas. (2R-140, 142.) Molina had talked to officials of both stores, M. Rivas Food Store and H.E.B. Both said that if Molina paid the debt off, they would be willing to drop the charges. Molina had paid the amount of money owed on these checks. (2R-148.) Molina first brought out Sandoval's name to Herber about the 23rd of May. (2R-119, 120.) When the gram was picked up, Molina did not know Rick, Ray or Ray's wife. Rick, Sandoval, Ray and his wife were talking about some jewelry. (2R-135, 136.) The first day Molina went to Ray's apartment, it did not concern any drugs. The following

day it did. (2R-143, 144.) Molina corrected his testimony about the events of May 28 and 29 to reflect that those same events occurred on May 29 and May 30. (2R-149, 150, 153, 154.)

Victor C. Mason said he assisted in surveillance of Herber at the K-Mart parking lot. (2R-158, 159.) Mason followed them to the Cascade Pool. (2R-160.) The driver and Molina then left in the pickup truck. Surveillance observed that the truck stopped at a convenience store. From there they drove through San Juan south, to the outer edge, outside the city limits. They stopped for a short while. Mason did not recall whether they met anybody there. (2R-169.) They came back north and proceeded to Ray's address. (2R-161.) They parked the truck and went inside Ray's residence. Mason had no personal knowledge as to what took place while they were at that apartment. (2R-168.) Mason did

not stay in that vicinity. A few minutes later he was requested to break off surveillance. (2R-162.) At approximately 7:30 p.m. that same night, Mason assisted on another surveillance at the M. Rivas Store in Pharr. Mason departed that area at approximately 7:45 p.m., and drove back to the San Juan area where he had previously been. Mason observed the same brown pickup truck parked in the same location at Ray's residence. Mason sat there until approximately 8:15 p.m. when the case agent advised that the person she was to meet was not going to show up. Surveillance was called off and Mason departed. The next morning, Mason took up surveillance at the La Plaza Mall parking lot in McAllen. Mason again saw the truck approach Herber's car. The driver got out and went to Herber's car, where he stayed for not more than five minutes. The driver got back in the truck and drove to a

location at South 19½ Street. Mason identified Sandoval as the driver. When the truck came back out into Mason's view, he followed it back to the La Plaza Mall where it parked next to Herber's car. The driver got out of the truck and entered Herber's car. Shortly thereafter, the arrest signal was given and Sandoval was arrested. (2R-163 to 166.)

Agent Michael L. Harper participated in the May 29th surveillance initiated at the K-Mart parking lot in McAllen. Harper observed Herber meet with Sandoval at the K-Mart parking lot and then followed them to the Cascade Park. After a few minutes, Harper helped the other units follow Sandoval to 211 North Nebraska in San Juan. (3R-174, 175.) 211 North Nebraska was Ray's residence. (3R-176.) Harper had no personal knowledge why the truck proceeded to 211 North Nebraska, nor about what took place after it got there.

Harper just saw Sandoval and Molina enter the door at 211. Harper did not stay around. (3R-182.)

Chemist Richard Ruybal said Government's Exhibits One and Two contained ninety-two percent cocaine. (3R-188, 189.)

Robert A. Clark arrested Ray at his house, 211 North Nebraska Street, on June 19, 1985. (3R-192, 193.)

The government rested. (3R-196.) Ray moved for but was denied an instructed verdict of acquittal. (3R-199.)

E. The Defense Case

Rick Bradley Reed (3R-235) and Ray's wife, Carol Ray, (3R-243) testified. Reed stated that on May 29, 1985, he was visiting Ray when Molina and Sandoval arrived. (3R-235, 236.) Reed also said that he did not recall Ray either giving anything to Sandoval or throwing Government's Exhibit One, the little package, on the table; and that he did

not see that little package there at Ray's house at all. (3R-237, 243.)

Petitioner Ray's wife, Carol Ray, testified that Molina went to her house one time with Sandoval when Sandoval went there to ask if he could have the truck one more day. Mrs. Ray did not see Sandoval or Molina give Ray any money, nor did she see Ray give Government's Exhibit One to Sandoval or Molina. Mrs. Ray said Molina was incorrect in so testifying. (3R-244 to 246.)

Ray renewed his motion for, but was denied, an instructed verdict of acquittal. (3R-251.)

SUMMARY OF ARGUMENT

A. Why This Court Should Review This Case

Petitioner Ray believes that:

(1) in this case the Fifth Circuit has rendered a decision in direct conflict with decisions of other federal courts of appeals on the same matter of federal law: United

States v. Escobar DeBright, 730 F.2d 1255 (9th Cir. 1984) (en banc) [complete abolition of concurrent sentence doctrine]; United States v. Moynagh, 566 F.2d 799, 802 n. 3 (1st Cir. 1977), cert. denied, 435 U.S. 917, 98 S.Ct. 1475, 55 L.Ed.2d 510 (1978) [refusal to apply doctrine because the court was satisfied collateral consequences of convictions on counts unsupported by sufficient evidence could possibly inure to defendant's future detriment]; and United States v. Holder, 560 F.2d 953, 955-956 (8th Cir. 1977) [refusal to apply the doctrine because the court feared an unreviewed conviction would reduce parole opportunities];

(2) in this case the Fifth Circuit has decided a federal question in a way in conflict in principle with:

(a) Mariscal v. United States, 449 U.S. 405, 101 S.Ct. 909, 66 L.Ed.2d 616 (1981) and United States v. Rubin,

439 U.S. 810, 99 S.Ct. 67, 58 L.Ed.2d 102 (1978); as well as

(b) Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978) and Thompson v. City of Louisville, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960); and

(3) in this case the Fifth Circuit has decided an important question of federal law which was left expressly undecided in Benton v. Maryland, 395 U.S. 784, 791 n. 7, 89 S.Ct. 2056, 2061 n. 7, 23 L.Ed.2d 707, 714 n. 7 (1969).

B. The Implications of Ray's Case

It is important that this Court finally resolve the merits of the questions presented. Without this Court's review, the disputed decision's actual and practical effects on petitioner Ray are (a) to continue his confinement without appellate review of the basis for his remaining incarcerated after

serving the minimum months; and (b) to reduce his opportunity for parole by from 32 to 48 months. The implications for other defendants are to perpetuate both (a) the judiciary's unconstitutional voiding of the executive's criminal prosecution decisions; and (b) the judicial process of predicting a litigant will probably not suffer adverse collateral consequences from convictions an appellate court declines to review. Thus, this Court should not let a wrong decision stand, since the question presented is of some general consequence to litigants in criminal cases in every federal circuit except the Ninth Circuit.

As the Ninth Circuit in United States v. Escobar DeBright, 730 F.2d 1255 (9th Cir. 1984), this Court should order the nation's federal courts to abandon the concurrent sentence doctrine, since:

(a) such practice impermissibly infringes on the prosecutorial function of the executive branch;

(b) that doctrine infringes upon and denies each defendant's right under 28 U.S.C. 1291, to have the entire conviction reviewed by a court of appeals;

(c) it is not at all clear such doctrine, if carefully applied, actually does serve the interests of judicial economy;

(d) no appellate court can conclude in good conscience that it possesses the ability to predict with sufficient certainty that there will be no adverse collateral legal consequences to the appellant from the unreviewed conviction; and

(e) the advantages of reviewing each conviction on its merits substantially outweigh the threatened harm from any resulting decrease in judicial efficiency.

C. What's Wrong With the Decision Below

In this case the Fifth Circuit improperly invoked the concurrent sentence doctrine. That court of appeals properly acknowledged (Pet.App.A-17):

> "This doctrine may not be applied if 'there is a significant likelihood that the defendant will suffer adverse collateral consequences.'" The court of appeals erred in vacating the conviction on Count Three "to avoid such potential adverse collateral consequences...."

(Pet.App.A-17.) Like an affirmance, the vacation of Ray's Count Three conviction, like a reversal for reasons other than being "not guilty", did not avoid the significant likelihood that Ray will suffer adverse collateral consequences from the lack of review.

By its refusal to review Ray's conviction, the Fifth Circuit violated his Fifth Amendment right not to be deprived of liberty without due process of law. Although the Fifth Circuit vacated the conviction on

Count Three, its action in no way altered the jury's verdict, but only effectively suspended Ray's sentence. His conviction will only be subject to appellate review "if the government 'determines that the interests of justice require reimposition of the sentence.'" (Slip Opinion, pp. 9 and 10; Pet.App.A-16 to 18.) Even though the government failed to prove its case beyond a reasonable doubt, the Parole Commission will use that charge against Ray.

The evidence was insufficient to support the jury's finding that petitioner Ray knowingly or intentionally possessed with intent to distribute approximately six ounces of cocaine as alleged in Count 3 of the indictment because the government failed to prove that Ray ever maintained sole or joint possession of that contraband. Ray should have been acquitted of that charge by the appellate court or the trial court. (3R-199, 251.)

Because the court of appeals vacated Ray's conviction under Count Three of the indictment on grounds not relating to innocence, the Parole Commission will use the facts contained there and in the pre-sentence investigation report to determine his "offense severity rating" under its guidelines. (Pet.App.A-52 to 54.) That use of Count Three will annihilate Ray's opportunity for release on parole after serving appropriate time of the substantive Count Two and its conspiracy offense Count One. If Ray's case at the Parole Commission only involved less than one gram of 100% pure cocaine, the Commission would place him in Category 2 of its guidelines. Under the guidelines he would thus be eligible for parole after serving 12 to 16 months of his seven year sentence. Pursuant to 18 U.S.C. 4205(a), Ray would otherwise be eligible for release after serving 28 months, which is one third of a

seven year sentence. However, because the Parole Commission will consider the alleged Count Three crime in determining that Ray should remain in Category 5, Ray will not be eligible for parole until after serving 48 to 60 months of his seven year sentence.

D. The Solicitor General's Expected Positions

Based upon the government's memorandum in opposition, the Solicitor General's expected positions in this case are that:

(1) Contrary to Ray's assertions regarding the merits of the insufficiency issue, which the court of appeals declined to address, the jury could reasonably conclude that Ray had provided the six ounces of cocaine to co-defendant Sandoval. (Memo in Opp. at 3 n. 2.)

(2) Ray should not be heard to complain about a rule that provided him with essentially the same relief that he would have obtained had he successfully challenged

sufficiency of the evidence supporting his conviction on the Count Three offense. (Memo in Opp. at 5.)

(3) The court of appeals' decision not to address the merits of Ray's challenge to the six ounce conviction on the Count Three offense could not have affected the timing of Ray's release from prison because "even if the court of appeals had found insufficient evidence to support the second possession conviction, the Parole Commission still would have been able to assess the severity of the conspiracy offense by reference to the evidence that Ray was involved in the sale of six ounces of cocaine." (Memo in Opp. at 6-7.)

E. Fallacies In The Solicitor General's Positions

(1) The jury could not legally have convicted Ray by speculation that the six ounces of cocaine had been provided by petitioner Ray, without evidence as to the

source of those six ounces, or without evidence that petitioner Ray had access to those six ounces.

(2) This case presents an issue regarding the propriety of vacating an unreviewed conviction and sentence under the concurrent sentence doctrine. That action clearly provided petitioner Ray with less relief than he would have received had he been acquitted of the Count Three crime.

(3) Once the court of appeals finds that insufficient evidence supports Ray's conviction for possessing six ounces of narcotics, due process prohibits the Parole Commission from assessing the severity of Ray's involvement in the conspiracy offense by reference to any evidence other than Ray's one gram substantive offense. Like a jury's finding of "not guilty," an appellate acquittal on the substantive six ounce offense should mean no less even for the Parole

Commission. Due process and that same appellate "not guilty" should require the Parole Commission to find that Ray's Count One conspiracy conviction only involved less than one gram of 100% pure cocaine.

ARGUMENT

I. Judicial Vacation Of Sentences Impermissibly Infringes On The Executive's Prosecutorial Function

Petitioner Ray submits that judicial use of the concurrent sentence doctrine is the judiciary's unconstitutional infringement on the executive branch's prosecution function and interest in retaining as final only legal convictions.

The executive power of the United States can be exercised only by the executive branch. "... [C]ourts cannot perform executive duties or treat them as performed when they have been neglected." United States v. McLean, 95 U.S. 750, 24 L.Ed. 579, 580 (1877). Congress has imposed the statutory duty upon each United

States Attorney within his judicial district to prosecute all offenses against the United States. 28 U.S.C. 547 and 541. The prosecutor has exclusive domain over charging. It is the prosecutor, not the court, who has the primary responsibility for determining which violations of the law will be prosecuted. United States v. Escobar DeBright, 730 F.2d 1255, 1257 (9th Cir. 1984). The judicial department cannot enjoin the President in the performance of his official duties. Mississippi v. Johnson, 71 U.S. 475, 18 L.Ed. 437 (1867). The separation of powers mandates judicial respect for the prosecutor's independence; and executive officers are not subject to judicial control in the exercise of their discretion in respect to pending matters within their jurisdiction and control. City of New Orleans v. Paine, 147 U.S. 261, 13 L.Ed. 303, 306 (1893). In criminal prosecutions, courts review executive action

to make sure that the executive charging decision and the resulting indictment or information are based on facts fairly found, not on arbitrary, capricious, fanciful, or illegal evidence. "Absent a constitutional violation or some form of misconduct justifying an exercise of its supervisory powers, a court errs when it interferes with decisions which are properly within the domain of the prosecutor." United States v. Carrasco, 786 F.2d 1452 1456 (9th Cir. 1986).

This Court noted recently that "'[t]he Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive and Judicial.' ***** Indeed, we also have observed only recently that '[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its powers, even to accomplish desireable objectives, must be resisted.'" Bowsher v.

Synar, ___ U.S. ___, 106 S.Ct. 3181, 3186, 3189, ___ L.Ed.2d ___ (1986). The structure of the Constitution does not permit Congress or the Judiciary to execute laws and prosecute crimes.

II. The Advantages of Reviewing Each Conviction On Its Merits Substantially Outweigh The Threatened Harm From The Decrease In Judicial Efficiency

No one can doubt that the appellate judiciary is confronted with caseloads of unprecedented magnitude, but "'the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government....'" Bowsher v. Synar, ___ U.S., at ___, 106 S.Ct., at 3193-3194, ___ L.Ed.2d, at ___ [quotation involves this Court's analysis of constitutionality of a portion of the Balanced

Budget and Emergency Deficit Control Act of 1985, 2 U.S.C. § 901 et seq. (Supp. 1986), popularly known as the "Gramm-Rudman-Hollings Act"].

After discussing five possible consequences of adverse legal consequences, a court recognized the extensive judicial expenditure of time and effort needed for the detailed review to see if the concurrent sentence doctrine may be properly invoked. United States v. Vargas, 615 F.2d 952, 960 (2nd Cir. 1980). There the court said:

> "Overall, a review of the above factors accomplished two things. First, it leads us to review appellant's substantive offense conviction on the merits. This is true because, to prevent invocation of the concurrent sentence doctrine, which is now the 'exception rather than the rule,' United States v. Ruffin, supra, the defendant should not have to make an affirmative showing of collateral consequences. Rather, to invoke the doctrine, the Government should have the burden of persuading the appellate court that the risk of collateral consequence is too slight to justify review. Application of the above five

factors to the instant case indicates that this burden has not been satisfied: the risk of collateral consequences in this, a case of a substantive count accompanying a conspiracy count, is sufficient to justify review of the former.

"Second, our specific analysis demonstrates how much uncertainty and judicial time and effort are involved in any review of the risk of collateral consequences, see Note, The Concurrent Sentence Doctrine After Benton v. Maryland, 7 U.C.L.A.—Alaska L.Rev. 282, 301-03 (1978), judicial time and effort that reduce any 'convenience' flowing from the doctrine.

"Three other points come to mind. First, the supposed 'convenience' is further reduced when the record has to be examined, as we had to here, to determine whether there is taint or spillover from the challenged conviction to the unchallenged one. Second, this 'convenience' really consists of not having to think or write about the point(s) of law raised concerning the challenged count by the appellant. Third, it would be logically just as 'convenient' to reverse the conviction on the unreviewed conviction as to affirm it. Id. at 283. We therefore, turn to the conviction of appellant on the substantive count."

III. The Appellate Court's Vacation Of Ray's Conviction Denied Him His Constitutional Right To Obtain Review Of His Claim

Petitioner Ray submits that the Due Process Clause of the Fifth Amendment was violated when the court of appeals refused to determine whether Ray's Count Three conviction rested on insufficient evidence. Despite petitioner Ray's request for review (Appellant's Brief at pp. 21-22), the Fifth Circuit ignored its judicial duty to measure the sufficiency of the evidence supporting the Count Three conviction.

Ray suggests that his is a proper case for this Court to declare that upon timely presentation, a defendant has a due process right to have the first appellate court determine whether he has been convicted of each element of his crime with proof beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 n. 12, 99 S.Ct. 2781, 2789 n. 12, 61 L.Ed.2d 560 (1979); and In Re

Winship, 397 U.S. 358, 362-365, 90 S.Ct. 1068, 1071-1073, 25 L.Ed.2d 368 (1970).

In Thompson v. City of Louisville, 362 U.S. 199, 80 S.Ct. 624, 625, 4 L.Ed.2d 654 (1960), this Court stated that the ultimate question presented was whether the loitering and disorderly conduct charges against Thompson "were so totally devoid of evidentiary support as to render his conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment." It noted the decision of this question "turns not on the sufficiency of the evidence, but on whether this conviction rests upon any evidence at all." In Thompson, the Court reversed the conviction, holding (footnotes omitted):

> "Thus we find no evidence whatever in the record to support these convictions. Just as 'Conviction upon a charge not made would be sheer denial of due process,' so is it a violation of due process to convict and punish a man without evidence of his guilt."

Id., 362 U.S., at 206, 80 S.Ct., at 629. See also Vachon v. New Hampshire, 414 U.S. 478, 94 S.Ct. 664, 38 L.Ed.2d 666 (1974). There the Court reversed, concluding that a conviction based on the complete absence of evidence as to one ingredient of the crime deprived the defendant of due process. The Due Process Clause of the Fifth Amendment requires at least the same minimal evidence for conviction. See Washington v. United States, 357 U.S. 348, 78 S.Ct. 1373, ___ L.Ed. 2d ___ (1958) [federal conviction reversed without elaboration "because of the insufficiency of the evidence"].

In Selman v. State, 663 S.W.2d 838, 840 (Tex.Cr.App. 1984), the court said:

> "It now appears that in light of Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); Greene v. Massey, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978), a challenge to the sufficiency of the evidence should be considered before disposing of a case even though reversal may be based on another ground."

Petitioner respectfully requests this Court to promulgate the Selman doctrine as the law of the land. Because Due Process requires sufficient evidence to support a conviction, neither the harmless error statute, 28 U.S.C. 2111, nor Fed. Rules Cr. Proc. rule 52, prevent this Court from determining that sufficiency claims must be reviewed at the intermediate or first appellate level.

IV. The Appellate Court's Vacation Of Ray's Conviction Denied Him His Statutory Right To Obtain Review Of His Claim

Persons convicted of federal crimes have a statutory right to have their convictions reviewed. 28 U.S.C. 1291.

> "Persons convicted of federal crimes are entitled to an appeal. That right is empty if no court decides the appeal. Under the concurrent sentence doctrine, which is founded solely on a concern for judicial economy, convictions resulting in concurrent sentences often go unreviewed, and yet affirmed, despite 'the obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences.' Sibron v. New York,

392 U.S. 40, 55, 88 S.Ct. 1889, 1899, 20 L.Ed.2d 917 (1968)."

United States v. Warren, 612 F.2d 887, 896 (5th Cir. 1980)(dissenting opinion), cert. denied, 446 U.S. 956, 100 S.Ct. 2928, 64 L.Ed.2d 815 (1980).

> "An additional reason counsels against maintenance of the doctrine in any form. Every federal criminal defendant has a statutory right to have his or her conviction reviewed by a court of appeals. 28 U.S.C. § 1291; Coppedge v. United States, 369 U.S. 438, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962). The statutory right to appeal is deemed so important that a district court judge is required to inform a defendant specifically of that right after trial and sentencing. See Fed.R.Crim.P. 32(a)(2). The right to appeal is from the judgment of conviction and not from the sentence. See Coppedge, 369 U.S. at 441, 82 S.Ct. at 919 ('Present federal law has made an appeal from a District Court's judgment of conviction in a criminal case what is, in effect, a matter of right.')(emphasis added). That right encompasses all convictions. The concurrent sentence doctrine, by permitting an appellate court to decline to review a conviction for reasons of judicial economy, impinges upon the defendant's statutory right."

United States v. Escobar DeBright, 730 F.2d 1255, 1259 (9th Cir. 1984).

V. Meritorious Unreviewed Issue: Insufficient Evidence With Regard To Six Ounce Crime In Count Three

Having unsuccessfully moved for a judgment of acquittal in the district court (3R-199, 251), Ray urged in the court of appeals that the evidence was insufficient to support his conviction under Count Three of the indictment. (Brief of Appellant at pp. 21-22.)

Viewed in the light most favorable to the government, the evidence at trial does not link Ray to the Count Three crime of possession of the six ounces of cocaine. The only evidence of any link between Ray and six ounces of cocaine, was informant Molina's testimony that Sandoval advised Ray about a person who was willing to buy ten ounces of coke, "... and that this person was requesting ten ounces and they weren't sure if they could

come up with the ten ounces but they had three ounces is what I heard John say and that they would have to go back and see if they could get the rest of it." (2R-97.) Molina also testified, however, he watched Sandoval retrieve the cocaine from his own apartment. (2R-104.) That narcotics pickup occurred after Sandoval, sitting in a vehicle with another party, advised Molina that he had the cocaine. (2R-101.)

The trial record herein is devoid of any evidence, direct or circumstantial, linking Ray to the crime for which he was convicted and incarcerated without appellate review.

The government failed to have its experienced chemist testify whether or not there was a molecular chemical similarity between both the cutting agents and the cocaine in Government Exhibit Nos. One and Two. (2R-183 to 173; 3R-174 to 192.) The jury was left to speculate illegally that each

exhibit was chemically identical and came from the same source. In fact, Molina first saw Government Exhibit One (one gram) at appellant's home, and Government Exhibit Two (six ounces) at Sandoval's apartment.

Petitioner Ray recognizes that proof of actual possession is not necessary, since constructive possession is sufficient. Such possession need not be exclusive, but may be shared with others, and may be proved by circumstantial as well as direct evidence. Constructive possession has been defined as "'the knowing exercise of, or the knowing power or right to exercise, dominion and control over the proscribed substance.'" United States v. Williams-Hendricks, 805 F.2d 496, 500 (5th Cir. 1986), rehearing denied ____ F.2d ____. However, whatever its nature, the evidence must be such that a jury may reasonably infer that the person charged with constructive possession had dominion and

control over the drug. United States v. Stephenson, 474 F.2d 1353, 1355 (5th Cir. 1973).

Absent evidence that Ray actually obtained the cocaine and thereafter gave it to Sandoval, a reasonably minded jury could only have had a reasonable doubt as to Ray's "knowing exercise of, or the knowing power or right to exercise, dominion and control over the proscribed substance." Id., 474 F.2d at 1355. In short, there was no proof of Ray's possession, actual or constructive. The court should reverse "because there is no evidence that he exercised any measure of dominion or control over the contraband." United States v. Jackson, 526 F.2d 1236, 1237 (5th Cir. 1976)

Considering both the applicable law and only the evidence and inferences that are in this record, there is insufficient evidence to support the Count Three conviction. Reversal

and acquittal on that count should follow. Ray's parole guidelines will be drastically altered. A much earlier parole can be foreseen.

VI. The Adverse Collateral Consequence Exception To The Concurrent Sentence Doctrine

In all circuits, an adverse collateral consequence exception developed after United States v. Hines, 256 F.2d 561 (2nd Cir. 1958) and Benton v. Maryland, supra. In United States v. Vargas, 615 F.2d 952, 959-960 (2nd Cir. 1980), the court listed five possible adverse collateral legal consequences of unreviewed convictions: effect on parole; possible application of recidivist statutes; potential impeachment in future trials; effect on pardon; and possible stigma. Such consequences also include: forfeiture of property, employment opportunities or civil rights; and deportation of an alien under 8 U.S.C. 1251(a)(4). United States v. Warren,

supra, 612 F.2d at 893 (5th Cir. 1980) (dissenting opinion).

The courts have not resolved, however, important questions concerning this exception's application. Some open questions are: is the mere "possibility" of adverse collateral consequences, enough, or should the doctrine apply unless there is a "real possibility" that the conviction "will have an appreciable impact on a party's substantial rights?"; who has the burden of showing the adverse collateral consequences, or the lack thereof?; which party has the burden of persuasion in the appellate court?; and what factors should be addressed before the doctrine is applied? See also Comment, The Collateral Consequences Exception To The Concurrent Sentence Doctrine, 44 TEMP. L. Q. 385 (1971).

VII. Appellate Courts Cannot Forecast Correctly That There Will Be No Adverse Collateral Legal Consequences To Ray From The Count Three's Vacated Conviction

Ray's case presents an appropriate context for this Court to provide the needed guidance to the Bar and the various circuit courts in the proper application of the doctrine.

The Fifth Circuit actually reviewed two of Ray's three convictions. It upheld the convictions under Counts 1 and 2. They involved one gram of cocaine, and the conspiracy count's unalleged amount of cocaine. That court declined to consider the Count 3 conviction where Ray was allegedly also involved with possession of six ounces of cocaine. That court failed to recognize that even its vacation order would cause adverse collateral consequences to Ray.

No one should contradict that because of Count Three, even after vacation, there are serious possibilities of adverse collateral consequences in this case. In this case, the factual collateral consequences include the

possibilities that officials or other persons considering appellant's record in the future, whether for purposes of parole, employment, impeachment as witness, etc., will consider the "qualified" vacated conviction. Such possibilities had prior to Benton v. Maryland, supra, resulted in judicial review of convictions even though the sentences had been served. See Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889, 1912, 20 L.Ed.2d 917 (1968); Ginsberg v. New York, 390 U.S. 629, 88 S.Ct. 1274, 1277 n. 2, 20 L.Ed.2d 195 (1968); Pollard v. United States, 352 U.S. 354, 77 S.Ct. 481, 484, 1 L.Ed.2d 393 (1957); Fiswick v. United States, 329 U.S. 211, 67 S.Ct. 224, 230, 91 L.Ed. 196 (1946).

Petitioner Ray believes that in this case the Fifth Circuit should not have applied the concurrent sentence doctrine, for there is a significant likelihood that Ray will suffer adverse collateral consequences (lengthened

incarceration = reduced parole opportunity). Application of the concurrent sentence doctrine in such a situation is improper. See United States v. Holder, 560 F.2d 953, 955-956 (8th Cir. 1977) [where the court refused to apply the concurrent sentence doctrine because the court feared an unreviewed conviction would reduce Holder's parole opportunities].

VIII. The Application of The Parole Commission Guidelines In This Case

Here, all must assume that the United States Parole Commission will follow its own guidelines. Experience indicates that the overwhelming majority of parole decisions fall within the guidelines.[3]

According to the Parole Commission guidelines, one of the effects of the unreviewed count herein is to raise the

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[3] Ruip v. United States, 555 F.2d 1331, 1335 (6th Cir. 1977); United States v. Salerno, 538 F.2d 1085, 1087 (3rd Cir. 1976); Kortness v. United States, 514 F.2d 167, 169 (8th Cir. 1975); Project, Parole Release Decision Making and the Sentencing Process, 84 Yale L.J. 810, 825 n. 75 (1975).

severity of petitioner Ray's alleged offenses from Category 2 to Category 5. See 28 C.F.R. 2.20(921)(c) and (e). In assigning its severity rating, the Parole Commission looks to the "actual offense behavior" of the underlying criminal charges brought against the offender. United States Parole Commission Research Unit, Guideline Application Manual (Nov. 1977). Since the offenses for which each prisoner is indicted, are thus deemed reliably established, the Parole Commission considers any specific criminal behavior that can be reliably established, 18 U.S.C. 4207, even if the offender involved has been convicted of a lesser offense or fewer offenses as a result of a plea bargain. This practice has received judicial approval. Peak v. Petrovsky, 734 F.2d 402, 404 (8th Cir. 1984)[Commission may consider charges dismissed as part of plea-bargaining agreement and other information in the presentence

report]; Billiteri v. United States Board of Parole, 541 F.2d 938, 944 (2nd Cir. 1976) [where the court analogized to the sentencing judge's power to take into account evidence of crimes of which the accused was "acquitted"]. The Commission automatically considers vacated convictions of alleged offenses is increasing its severity rating. 28 C.F.R. 2.19(c).

Before one can determine an offender's parole guidelines, one must first determine the statute under which the offender was sentenced. In this case offender Ray was sentenced under 18 U.S.C. 4205 (a). Rule 28 C.F.R. 2.2(a) of the Parole Commission Rules and Procedure Manual[4] [p. 1], provides:

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[4] Ray has lodged with the Clerk of this Court a copy of the Report of the United States Parole Commission (10/1/83 to 9/30/84), which contains the Parole Commission Rules and Procedure Manual (Edition of 11/10/85) at that Report's "11/04/85 pages" 1 to 92. That Manual Edition's amendments are found bound after that same report at pp. "J-141 to 153". That Manual is now in effect and was in effect at the time Ray had his parole hearing.

> "A Federal prisoner serving a maximum term or terms of more than one year imposed pursuant to 18 U.S.C. 4205 (a) ... may be released on parole in the discretion of the Commission after completion of one-third of such term or terms, or after completion of ten years of a life sentence or of a sentence of over thirty years."

The Solicitor General represented (Memo in Opp. at 6) that in Ray's case parole regulation 28 C.F.R. 2.20(101) should apply to Count Three's six ounce possession. 28 C.F.R. 2.20(101) indicates that when a conspiracy count is involved, the underlying offense is the basis by which to determine the offense category of the conspiracy crime. The Fifth Circuit apparently chose to vacate Count Three, "to avoid ... potential adverse consequences" (Pet.App.A-17), since Ray should not suffer adverse consequences because of an unreviewed conviction. Benton v. Maryland, supra. However, as the Notice of Action

letter[5] from the Parole Commission indicates Ray's alleged Count Three crime

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[5] "On September 18, 1986, the Parole Commission's National Appeals Board rejected petitioner's claim that his offense had been incorrectly assigned a category 5 severity rating. The Board stated that '[t]he record reflects that you were convicted on all three counts of the indictment, said sentences to run concurrent to each other. The total amount of drugs involved in your case was 154 grams of 100% pure cocaine. Your offense severity was accurately assessed pursuant to 28 C.F.R. Section 2.20(921)(F).'" (Memo in Opp. at 6 n. 4.) That Board's September 18, 1986 Notice of Action letter reads in part:

In the case of the above-named, the following parole action was ordered:

Revoke Parole; None of the time spent on Parole shall be credited. The unexpired portion of your original Federal sentence will commence, upon your release by parole or Mandatory Release from your new sentence. Continue to a Presumptive Parole on the new sentence after service of 54 months, December 15, 1989; Presumptive Parole on the violator term as of the same date pursuant to 28 CFR 2.24(b)(2).

(REASONS/CONDITIONS)

Finding of Fact: Charge #1(A): Possession with Intent to Distribute Cocaine
Charge #1(B): Possession with Intent to Distribute One Ounce of Cocaine.
Charge #1(C): Possession with Intent to Distribute Six Ounces of Cocaine.

Your parole violation has been rated as Category Five severity because it involved possession with intent to

continues to have adverse collateral consequences.

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distribute Cocaine equivalent to more than 100 grams but less than 1 kilogram of 100% purity.

Your salient factor score is 5. You have been in federal confinement as a result of your behavior for a total of 9 months. Guidelines established by the Commission indicate a range of 48-60 months to be served for cases with good institutional adjustment and program achievement.
After review of all relevant factors and information presented, a decision outside the guidelines at this consideration is not found warranted.

SALIENT FACTOR SCORE (SFS-81): Your individual salient factor score items have been computed as shown below. For an explanation of the salient factor score items, see reverse side of this form.

ITEM A [1]; B [1]; C [2( )*]; D [0]; E [0]; F [1] TOTAL SCORE [5]
*If five or more prior commitments, place an 'x' in the parenthesis in Item C.
*****

REASONS:

In response to your claim that your offense severity is incorrectly rated as Category Five, this claim is without merit. The record reflects that you were convicted on all three counts of the indictment, said sentence to run concurrent to each other. The total amount of drugs involved in your case was 154 grams of 100% pure cocaine. Your offense severity was accurately assessed pursuant to 28 CFR Section 2.20 (921/(F).

To allow the Parole Commission to use a "vacated" count as the basis for making this offender fall into a Category 5 severity is exactly what has happened. To avoid the adverse consequences of the current Fifth Circuit Ray ruling, the parole rules would require a court to review Count Three with a finding of not guilty. Parole Commission Manual's Rule 28 C.F.R. 2.20-04 provides in part:

> "2.20-04. Offense Severity Rating. In applying the guidelines, the offense severity rating shall reflect the overall circumstances of the present offense behavior. Select the offense rating appropriate to the actual offense behavior that occurred. The severity rating must be explained on the Notice of Action Worksheet (in the space provided) by a brief summary of the specific facts that justified the rating. 28 C.F.R. 2.19(c) provides: 'The Commission may take into account any substantial information available to it in establishing the prisoner's offense severity rating, salient factor score, and any aggravating or mitigating circumstances, provided the prisoner is apprised of the information and afforded an

opportunity to respond. If the prisoner disputes the accuracy of the information presented, the Commission shall resolve such dispute by the preponderance of the evidence standard; that is, the Commission shall rely upon such information only to the extent that it represents the explanation of the facts that best accords with reason and probability. However, the Commission shall not consider in any determination charges upon which a prisoner was found not guilty after trial unless reliable information is presented that was not introduced into evidence at such trial (e.g., a subsequent admission or other clear indication of guilt).'"

In this case offender Ray has been convicted and sentenced on three counts. Each count resulted in a seven year concurrent sentence, plus special parole terms of five years on counts two and three. The offender would qualify for serving one-third of his time in 28 months (12 months per year x 7 years = 84 months, and 1/3rd of 84 = 28 months), but for the Parole Guidelines, which in this case exceed 28 months. One would thus proceed to compute this offender's parole

eligibility under current guidelines in the following manner.

How Parole Eligibility is Determined

The Federal Parole Commission has developed a specific framework for determining parole eligibility. This is accomplished by first determining the offender's Salient Factor Score,[6] and then by applying that score on a scale known as Severity of Offense Behavior.

The Severity of Offense Behavior scale determines the general period of time within which the normal guidelines for parole will be established for a particular offender. The GUIDELINES FOR DECISION MAKING are found in 28 C.F.R. 2.20.

One must first total the points earned by an offender in his or her response to the

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[6] The form used to determine the Salient Factor Score is in Parole Commission 1985 Manual at 45.

questions proposed by the Salient Factor Score (in this case the total is five (5)), and then apply that number to the scale listed at the top of Guidelines For Decision Making. A score of 5-4 is considered fair. It is next to lowest score one can achieve.

Next one must determine the level of severity for the offender's criminal behavior. In Ray's case one would turn to Parole Commission Regulations 28 C.F.R. 2.20 (921)(f) through (i). They read:

"(f) If medium scale (e.g., involving 100 grams-1 kilogram of 100% purity, or equivalent amount), grade as Category Five.

(g) If small (e.g., involving 5-99 grams of 100% purity, or equivalent amount), grade as Category Four.

(h) If very small scale (e.g., involving 1.0-4.9 grams of 100% purity, or equivalent amount), grade as category three.

(i) If extremely small scale (e.g., involving less than 1 gram of 100% purity, or equivalent amount), grade as Category Two."

Consistent with 28 C.F.R. 2.20 (Notes to Chapter Nine (2)), the Parole Commission 1985 Manual at 32 provides this formula to calculate the 100% pure equivalency of cocaine:

Quantity Involved (in grams) x Actual Purity (expressed in decimal)

In Ray's case, 92% was the purity of both the amounts in counts two (one gram) and three (six ounces or 170.1 grams). Their "equivalent amounts" of 100% pure cocaine would be: 156.49 grams of 100% cocaine. That is 6 ounces x 28.35 grams per ounce = 170.1 grams from count three. That, plus 1 gram from count two, equals 171.1 total grams of 92% cocaine which are involved in counts two and three. That .92 x 171.1 grams = 156.49 grams of 100% cocaine. That quantity is considered a category five offense. 28 C.F.R. 2.20(921)(f). That is apparently how the Parole Commission's National Appeal Board determined on September 18, 1986 that Ray was

a category five offender under its Guidelines for Decision Making. Thus offender Ray falls into a guideline range from 48 to 60 months.

However, if count three of this case is reversed on grounds of insufficiency of the evidence with a finding of "not guilty," then arguably only one gram of 92% cocaine would be before the Parole Commission. This would, place offender Ray at a severity level of category two with a salient factor score of five. If offender Ray were successful before the Commission, his parole guidelines would drop from 48-60 months down to 12-16 months. Since 28 months is one third of a seven year sentence, the guidelines are inapplicable, and Ray could, in theory, be subject to a parole date of 28 months. This does not mean absolutely that he would be paroled in 28 months. The Parole Commission has the ability to place an offender above or below

guidelines,[7] 18 U.S.C. 4206(c), or the Parole Commission could make a subjective decision.[8]

Not all offenders are granted parole. Some are subject to mandatory release after serving two-thirds of their sentence. In Ray's case, his seven years sentence equals an eighty-four months sentence. Two thirds of those eighty-four months equals fifty-six months. See 28 C.F.R. 2.35.

The point of concern, however, is the fact that currently with offender Ray the Parole Commission is bound to guidelines of 48 to 60 months and he is placed in a category five severity level. Because of the Fifth Circuit's use of the doctrine, Ray has

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[7] See for example the discussion in the 1985 Manual's Rules 28 C.F.R. 2.20-05 through 2.20-09 [at 56-62] of the Parole Commission Rules.

[8] See those examples cited in that 1985 Manual's Rule 28 C.F.R. 2.20-04 [beginning at the bottom of 55 to top of 56].

effectively been prevented from being given a reopened parole hearing where the Parole Commission would not be able to consider, 28 C.F.R. 2.19(c), the guilty finding on count three which should have been reversed so a "not guilty" could be entered. With such a "not guilty", Ray most probably will be considered by the Parole Commission as a category two offender.

In summary the options discussed above are unavailable under the current status of Ray's case absent a judicial finding of "not guilty" on the Count Three crime. Thus, adverse collateral consequences remain for Ray because of the unreviewed but vacated Count Three conviction. The Fifth Circuit erred.

IX. The History Of The Concurrent Sentence Doctrine In This Court

Sometime ago in Pierce v. United States, 352 U.S. 239, 252-253, 40 S.Ct. 205, 210, 64 L.Ed. 542 (1920), the Court said:

> "The conceded insufficiency of the first count of the indictment does not warrant a reversal, since the sentences imposed upon Pierce, Creo, and Zeilman did not exceed that which lawfully might have been imposed under the second, third, or sixth counts, so that the concurrent sentence under the first count adds nothing to their punishment."

In Ball v. United States, ___ U.S. ___, 105 S.Ct. 1668, 1669, 84 L.Ed.2d 740 (1985), the Court granted certiorari to decide whether a felon possessing a firearm may be convicted and concurrently sentenced under 18 U.S.C. 922(h)(1), for receiving that firearm, and 18 U.S.C. 1202(a)(1), for possessing the same weapon. After extensive discussion of legislative intent, the Court concluded:

> "... that Congress had no intention of creating duplicative punishment for one limited class of persons falling within the overlap between the two Titles—convicted felons who receive firearms and who, by definition, possess them. The independent, but overlapping statutes simply are not 'directed to separate evils' under the circumstances."

Id., ___ U.S., at ___, 105 S.Ct., at 1673. Then this Court discussed the inapplicability of the concurrent sentence doctrine to the facts in Ball. The Court's majority said:

> "Having concluded that Congress did not intend petitioner's conduct to be punishable under both §§ 922(h) and 1202(a), the only remedy consistent with the congressional intent is for the district court, where the sentencing responsibility resides, to exercise its discretion to vacate one of the underlying convictions. The remedy of ordering one of the sentences to be served concurrently with the other cannot be squared with Congress' intention. One of the convictions, as well as its concurrent sentence, is unauthorized punishment for a separate offense. See Missouri v. Hunter, 459 U.S. 359, 368, 103 S.Ct. 673, 679, 74 L.Ed.2d 535 (1983).
>
> "The second conviction, whose concomitant sentence is served concurrently, does not evaporate simply because of the concurrence of the sentence. The separate conviction, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored. For example, the presence of two convictions on the record may delay the defendant's eligibility for parole or result in an increased sentence under a recidivist statute for a future

offense. Moreover, the second conviction may be used to impeach the defendant's credibility and certainly carries the societal stigma accompanying any criminal conviction. See Benton v. Maryland, 395 U.S. 784, 790-791, 89 S.Ct. 2056, 2060-2061, 23 L.Ed.2d 707 (1969); Sibron v. New York, 392 U.S. 40, 54-56, 88 S.Ct. 1889, 1898-1899, 20 L.Ed.2d 917 (1968). Thus, the second conviction, even if it results in no greater sentence, is an impermissible punishment.

*****

"We hold that Congress did not intend a convicted felon, in Ball's position, to be convicted of both receiving a firearm in violation of 18 U.S.C. § 922(h), and possessing that firearm in violation of 18 U.S.C. App. § 1202(a). Accordingly we vacate the judgment of the Court of Appeals and remand with instructions to have the District Court exercise its discretion to vacate one of the convictions."

Id., ___ U.S., at ___, 105 S.Ct., at 1673-74.

The vacation in Ball is obviously to avoid constitutional double jeopardy grounds and would have to be honored by the Parole Commission. That vacated count will not be used at all by the Parole Commission in its

determination of Ball's parole release opportunities. 28 C.F.R. 2.19(c). Thus the Ball vacation is quite unlike the Ray vacation. Ray's was for a non-constitutional ground, which the Parole Commission will consider in its determination of Ray's parole release opportunities. 28 C.F.R. 2.19(c).

In Benton v. Maryland, 395 U.S. 784, 787-791, 89 S.Ct. 2056, 2058-2061, 23 L.Ed.2d 707, 711-714 (1969), this Court reviewed the historical evolution of the concurrent sentence doctrine and recognized the utility of that doctrine as "a rule of judicial convenience." Finding that the Benton dispute did not present the issue, this Court expressed no opinion on whether "... an attempt to impose collateral consequences after an initial refusal to review a conviction on direct appeal because of the concurrent sentence doctrine may well raise some constitutional problems." Id, 395 U.S.,

at 791 n. 7, 89 S. Ct., at 2061 n. 7, 23 L.Ed.2d, at 714 n. 7.

The concurrent sentence doctrine, as approved by this Court in Hirabayashi v. United States, 320 U.S. 81, 105, 63 S.Ct. 1375, 1387, 87 L.Ed. 1774 (1943), provides that when a defendant receives concurrent sentences on more than one count of an indictment and one of the convictions can be affirmed, a court need not review the conviction on the remaining counts. See also United States v. Romano, 382 U.S. 136, 138, 86 S.Ct. 279, 15 L.Ed.2d 210, 212 (1965); Lawn v. United States, 355 U.S. 339, 359, 78 S.Ct. 311, 323, 2 L.Ed.2d 321, 335 (1958) [unnecessary to consider sufficiency claims on two counts since the sentences ran concurrent with the sentence on a third count, which the Court found sustained by the evidence]; Claassen v. United States, 142 U.S. 140, 146-147, 12 S.Ct. 169, 170, 35 L.Ed. 966

(1891) [since no doubt of the sufficiency of the first count of conviction, "the question of the sufficiency of the other counts need not be considered"]; Locke v. United States, 11 U.S. (7 Cranch) 339, 344, 3 L.Ed. 364, 366 (1813). Cf. Ballew v. United States, 160 U.S. 187, 16 S.Ct. 263, 40 L.Ed. 388 (1895) [where the trial court's general judgment was reversed and the cause remanded with instructions to enter a judgment upon the good count and for "such proceedings with reference to the [bad] count as may be in conformity to law"]; Putnam v. United States, 162 U.S. 687, 16 S.Ct. 923, 934, 40 L.Ed. 1118 (1896). There the Court refused to apply the rule and reversed convictions on some counts of a multicount indictment where concurrent sentences had been imposed. The unreviewed conviction therefore is usually affirmed. See, e.g., Barnes v. United States, 412 U.S. 837, 848 n. 16, 93 S.Ct. 2357, 2364 n. 16, 37

L.Ed.2d 380 (1973); Andresen v. Maryland, 427 U.S. 463, 469 n. 4, 96 S.Ct. 2737, 2743 n. 4, 49 L.Ed.2d 627, 636 n. 4 (1976)[rule restated but not applied].

This Court has indicated, however that affirmance of the unreviewed conviction may not be appropriate if the defendant would suffer adverse consequences as a result of the additional, unreviewed conviction. Benton v. Maryland, 395 U.S. 784, 790-792, 89 S.Ct. 2056, 2060-2061, 23 L.Ed.2d 707, 713-715 (1969). In this case, this Court has the opportunity to also declare that vacation of an unreviewed conviction and sentence is inappropriate if the defendant would suffer adverse consequences as a result of the unreviewed conviction.

Although the doctrine of this judicially created rule has been approved by this Court,

disparate judicial application[9] of the doctrine has become its hallmark in the various circuit courts since Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969).

Petitioner is aware of United States v. Rubin, 439 U.S. 810, 99 S.Ct. 67, 58 L.Ed.2d 102 (1978). There the Solicitor General reasoned (Supplemental Brief at pgs. 4 to 10), that the Fifth Circuit had improperly affirmed, applying the concurrent sentence doctrine under the circumstances of that case, because there was a significant likelihood that Rubin would suffer adverse collateral consequences as a result of the two unreviewed convictions; and that a reversal of the unreviewed convictions would favorably shorten the length of Rubin's incarceration. Upon

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[9] The Solicitor General summarized the disparities among the Federal Circuits. (Memo in Opp. at 4 n. 2).

remand in Rubin, the Fifth Circuit went on to hold that because the Parole Commission looks to the "actual offense behavior" which can be reliably establish, that court should not have applied the concurrent sentence doctrine because (a) Rubin's challenge to the unreviewed convictions were on grounds related to guilt or innocence; and (b) under the Parole Commission guidelines, the recommended term of incarceration increases as the offense severity rating increases. United States v. Rubin, 591 F.2d 278, 281-282 (5th Cir. 1979). See also Mariscal v. United States, 449 U.S. 405, 101 S. Ct. 909, 66 L.Ed.2d 616 (1981). This Court's majority opinion in Mariscal reads in part:

> "This case arises on a petition for certiorari to the United States Court of Appeals for the Ninth Circuit .... The court affirmed the interstate transportation convictions on the merits, and declined to address the 'rather complex issues' presented by the mail fraud convictions, invoking the discretionary 'concurrent sentence' doctrine. ***** In light of the

> Solicitor General's concession in this Court that the mail fraud convictions were invalid, Memorandum in Opposition 4-5, we grant the motion of petitioner for leave to proceed in forma pauperis, grant certiorari, vacate the judgment of the Ninth Circuit affirming the mail fraud convictions, and remand for reconsideration of the applicability of the 'concurrent sentence' doctrine to a conviction conceded by the United States to be erroneous."

Despite his confessions of error in Rubin and Mariscal, the Solicitor General tries to distinguish this case from Rubin and Mariscal, arguing that in Rubin and Mariscal the courts of appeals had affirmed the defendants' convictions on the counts, while here by contrast the court of appeals vacated the unreviewed conviction. (Memo in Opp. at 5 n. 3.) Such distinction is without substance, since an acquittal on the unreviewed Count Three conviction will reduce Ray's parole opportunities by as much as 48 or 32 months. Thus Ray should at least receive the same relief this Court rendered in Rubin and Mariscal.

X. The Need For A Bright Line Decision

In United States v. Warren, 612 F.2d 887, 895-896 (5th Cir. 1980)(en banc), cert. denied, 446 U.S. 956, 100 S.Ct. 2928, 64 L.Ed.2d 815 (1980), Judges Roney, Hill, Clark, Fay and Vance, dissented to the majority's failure to address the propriety of the concurrent sentence doctrine. They stated:

> "A review of the cases in this and other circuits reveals that all have often exercised their discretion to refuse to review concurrent sentences. 'That this is the general rule cannot be doubted. That it should not be made a fetish is equally clear.' 2 C. Wright, Federal Practice and Procedures: Criminal § 527 at 422-23 (1969)."

> "The widespread haphazard application of the doctrine has been well documented. Comment, The Concurrent Sentence Doctrine After Benton v. Maryland, 7 U.C.L.A. - Alas. L. Rev. 282 (1978). In this and another law review article, a number of issues are thoughtfully presented and thoroughly discussed. Comment, The Federal Concurrent Sentence Doctrine, 70 Colum. L. Rev. 1099 (1970). It is now time to judicially resolve these issues."

See also Note, The Concurrent Sentence Doctrine: Sound Judicial Procedure Or Illegitimate Shortcut?, U.Ill.L.Rev. 723, 753 (1981). That note assesses the role of the doctrine, and concludes:

> "The various proposals suggested during the last decade are significant demonstrations that the achievement of nonprejudicial judicial economy is possible. The maintenance of judicial procedures which operate at the expense of a denial of a measure of fundamental fairness to a party, such as the concurrent sentence doctrine, therefore, cannot be justified on the basis of the need for judicial economy. Continued use of the concurrent sentence doctrine cannot be justified as sound procedure, but must be characterized as an illegitimate shortcut."

This matter is ripe for resolution, which will bring uniformity to the decisions of the various courts of appeals. Persons convicted of federal crimes are entitled to an appeal. That right is empty if a court refuses to decide the appeal. Under the concurrent sentence doctrine, which is founded solely on

a concern for judicial economy, convictions resulting in concurrent sentences often go unreviewed despite "the obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences." Sibron v. New York, 392 U.S. 40, 55, 88 S.Ct. 1889, 1899, 20 L.Ed.2d 917 (1968). The "vacation" approach of Hooper is impractical as demonstrated in United States v. Escobar DeBright, 730 F.2d 1255, 1257-58 (9th Cir. 1984). The Hooper approach fails to take into account that pursuant to its 1985 Manual's Rule 2.20-04 and 28 C.F.R. 2.19(c), the Parole Commission looks to the "actual offense behavior" which can be reliably established and will consider reversed and/or vacated convictions unless such reversed or vacated conviction is on grounds related to innocence. See United States v. Rubin, 591 F.2d 278 (5th Cir. 1979), cert. denied, 444 U.S. 864, 100 S.Ct. 133, 62 L.Ed.2d 87 (1979).

XI. The Ninth Circuit's Abandonment Of The Concurrent Sentencing Doctrine

The Ninth Circuit sitting en banc has abandoned the concurrent sentence doctrine. United States v. Escobar DeBright, 730 F.2d 1255 (9th Cir. 1984). There, the court said:

> "Finally, there are substantial practical difficulties with the implementation of Hooper. Under Hooper, the judgment of conviction is vacated but the jury verdict remains intact. The government is then invited to seek reinstatement of the judgment at any point in the future if new or changing circumstances make a conviction significant. Hooper, 432 F.2d at 606 n. 8. If the conviction were reinstated, it would then be subject to appellate review. Id. This unwieldy procedure is fraught with the potential for delay and the wasting of judicial resources. Inevitably, it would result in fragmented appeals of issues that could have been disposed of by the original reviewing court. This practice also places an onerous burden on the government to monitor ongoing circumstances that might be relevant to the previously unreviewed convictions. Consider, for example, a Parole Commission which considers a ten-year-old unreviewed conviction relevant to its determination of a parole date. The vacated conviction would then be significant to the government under Hooper. Presumably, the Parole Commission would then recess, while the government seeks reinstatement of the

judgment of conviction, after which the defendant would appeal. If the previously unreviewed conviction were affirmed, a year or so later, the Parole Commission would resume consideration of a parole date. If the conviction were instead reversed, the government and defendant would attempt to find witnesses and evidence to retry a now stale case. We reject this procedure as impractical.

"In some appeals from multiple count criminal convictions with concurrent sentences, the societal interests and those of the administration of justice may point towards the wisdom of dismissal of a count. But that can best be accommodated in our system by an appropriate policy instituted by the Department of Justice, not by the ad hoc actions of an appellate court."

Id. at 1257-58.

XII. The Jumbled Holdings of The Fifth Circuit

In the aftermath of Benton, the Fifth Circuit has unevenly applied the concurrent sentence doctrine. United States v. Warren, supra, 612 F.2d at 892 (5th Cir. 1980) (dissenting opinion) (en banc court split 5 to 9). Application of the doctrine has been held to be appropriate when "prejudice is not apparent and the possibility of adverse

collateral consequences appears to be remote." United States v. Binetti, 547 F.2d 265, 269 (5th Cir. 1977). However, "Despite such statements, we have often applied the doctrine mechanically without really considering the adverse consequences." United States v. Rubin, 591 F.2d 278, 280 (5th Cir. 1979), cert. denied, 444 U.S. 864, 100 S.Ct. 133, 62 L.Ed.2d 87 (1979). Because the Parole Commission looks to the "actual offense behavior" which can be reliably established, the Rubin court went on to hold that it should not have applied the concurrent sentence doctrine because (1) Rubin's challenge to the unreviewed convictions were on grounds related to guilt or innocence; and (2) under the Parole Commission guidelines, the recommended term of incarceration increases with offense severity rating increases. Id., 591 F.2d at 281-282.

In United States v. Cardona, 650 F.2d 54, 57-58 (5th Cir. 1981), the court borrowed from United States v. Hooper, 432 F.2d 604, 606 (D.C. Cir. 1970), saying:

> "Rather than affirm or make a detailed review of sufficiency at this time, we choose another course. In United States v. Hooper, 432 F.2d 604, 606 (D.C.Cir.1970), that court vacated a judgment of conviction for which a concurrent sentence was imposed, observing that vacation of such a judgment 'does not impair any need of the government, avoids the possibility of adverse collateral consequences to defendant, and furthers the general interest of the administration of justice ....' The Court then noted,
>
> > The vacation of the judgment does not destroy the jury verdict, but is rather equivalent in practical effect to a suspension of the imposition of sentence. If it later develops that the interest of justice so requires, the sentence can be reimposed on a concurrent basis. The conviction could then be subject to appellate review.
>
> 432 F.2d 606 n.8."

Nevertheless, since Cardona, the Fifth Circuit has now reverted to using the Hooper approach to "mechanically" apply the

concurrent sentence doctrine without really considering the adverse consequences. See United States v. Montemayor, 703 F.2d 109, 116 (5th Cir. 1983), cert. denied, 464 U.S. 822, 104 S.Ct. 89, 78 L.Ed.2d 97 (1983); and the case at bar. By thus grasping at the Hooper approach, the Fifth Circuit failed to consider that indeed the simple vacation of Hooper's Count 1 conviction probably avoided the possibility of any adverse collateral consequences to Hooper, because Hooper's Count 2 conviction was for the "same robbery, of the same premises and the same money ...." Hooper v. United States, supra, 432 F.2d at 604.

On the one hand, the Fifth Circuit has declined to apply the doctrine because the government had "not affirmatively demonstrated that the likelihood of harm either in the form of collateral consequences or of prejudice in sentencing and at trial was so remote or to be insignificant on the facts." United States v.

Evans, 572 F.2d 455, 477 (5th Cir. 1978), cert. denied, 439 U.S. 870, 99 S.Ct. 200, 58 L.Ed.2d 182 (1978). On the other hand, in United States v. Strickland, 509 F.2d 273, 274 (5th Cir. 1975) because the appellant had "not shown any reason why the [unreviewed] convictions ... add anything material to the pains and penalties he will suffer from the [affirmed] conviction." Confusing, isn't it?

XIII. The Application Of The Doctrine In The Other Circuits

Other Courts of Appeals have followed a variety of approaches.

The First Circuit affirmed all counts after invoking the doctrine, saying:

> "We discern no concrete prejudice to the defendant as a consequence of the challenged counts, either directly in this case or collaterally in possible future proceedings, and the defendant suggests none."

United States v. Gordon, 634 F.2d 639, 643 (1st Cir. 1980). However, that court has declined to do so. United States v. Moynagh,

566 F.2d 799, 802 n. 3 (1st Cir. 1977), cert. denied, 435 U.S. 917, 98 S.Ct. 1475, 55 L.Ed.2d 510 (1978) [refusal to apply doctrine because, "We are satisfied that the collateral consequences of defendant's conviction on counts unsupported by sufficient evidence could possibly inure to defendant's future detriment"].

The Second Circuit has followed the four different patterns detailed in United States v. Vargas, 615 F.2d 952, 956-957 (2nd Cir. 1980). That court has noted that "utilization of the concurrent sentence doctrine is now the exception rather than the rule ...." United States v. Ruffin, 575 F.2d 346, 361 (2nd Cir. 1978). See United States v. Febre, 425 F.2d 107, 113 (2nd Cir. 1970), cert. denied, 400 U.S. 849, 91 S.Ct. 40, 27 L.Ed.2d 87 (1970). Febre is discussed in Note, The Federal Concurrent Sentence Doctrine, 70 COLUMBIA L.REV. 1099 (1970). See also United States v.

Hines, 256 F.2d 561 (2nd Cir. 1958). Hines apparently is an early case where, in spite of identical concurrent sentences on all counts, a court felt "constrained" to entertain challenges to one of three convictions, recognizing that the nature of the error committed below or other circumstances suggested that Hines might have received a longer sentence than otherwise would have been imposed, or that he has been prejudiced by the results of the proceedings. Hines is discussed in Note, Criminal Procedure—Appeal May Be Taken To One Count of Multi-Count Conviction Where Concurrent Sentences Have Been Imposed, 107 U.PA. L. REV. 726 (1959).

The Third Circuit recently noted that it had discretion to apply the doctrine but decided not to follow that procedure in the particular case. United States v. Otto, 742 F.2d 104, 108 n. 2 (3rd Cir. 1984), cert. denied, ___ U.S. ___, 105 S.Ct. 978, 83

L.Ed.2d 980 (1985). However, that court will invoke the doctrine, decline review and affirm all counts where it can see no appreciable risk of greater collateral consequences flowing from all the convictions. United States v. Lampley, 573 F.2d 783, 788 (3rd Cir. 1978).

The Fourth Circuit will usually provide full review unless the government can assure, and the court can say, that there is no substantial possibility that the "unreviewed" conviction(s) will not expose the defendant to a substantial risk of adverse consequences. United States v. Walker, 677 F.2d 1014, 1015-1016 (4th Cir. 1982). That court has said: "[W]e cannot predict with certainty whether the RICO convictions will at some future point work some unforeseen harm to the defendants. *** We refuse to place the risk of future collateral consequences upon the defendants." United States v. Webster, 639

F.2d 174, 182-183 (4th Cir. 1981), cert. denied, 454 U.S. 857, 102 S.Ct. 307, 70 L.Ed.2d 152 (1981). That court has said:

> "Despite the Order of this Court to vacate the convictions of those on board the vessels, as to Count Two, there is no need to remand for resentencing since the punishment on this Count was to be served concurrent with the punishment imposed on Count One."

United States v. Manbeck, 744 F.2d 360, 391 (4th Cir. 1984), cert. denied, ___ U.S. ___, 105 S.Ct. 1197, ___ L.Ed.2d ___ (1985) [convictions on count 2 vacated and indictments on count 2 dismissed due to insufficiency of the evidence].

The Sixth Circuit has exercised its discretion to resolve some claims and pretermit others. Compare United States v. Maze, 468 F.2d 529, 536 n. 6 (6th Cir. 1972), affirmed, 414 U.S. 395, 94 S.Ct. 645, 38 L.Ed.2d 603 (1974), with Ethridge v. United States, 494 F.2d 351 (6th Cir. 1974), cert. denied, 419 U.S. 1025, 95 S.Ct. 504, 42

L.Ed.2d 300 (1974). That court sometimes assumes adverse consequences exist and refuses to apply the doctrine. See Gentry v. United States, 533 F.2d 998, 1001 (6th Cir. 1976).

The Seventh Circuit has said that it will consider the validity of all challenged convictions unless "there is no possibility of undesirable collateral consequences attendant upon these convictions...." United States v. Tanner, 471 F.2d 128, 140 (7th Cir. 1972), cert. denied, 409 U.S. 949, 93 S.Ct. 269, 34 L.Ed.2d 220 (1972). See Crovedi v. United States, 517 F.2d 541, 550 (7th Cir. 1975); United States v. Rodgers, 755 F.2d 533, 538 n. 1 (7th Cir. 1985), cert. denied, ___ U.S. ___, 105 S.Ct. 3532, ___ L.Ed.2d ___ (1985). In Rodgers the court declined to invoke the discretionary concurrent sentence doctrine since it could not rule out the possibility of collateral effects resulting from the conviction on the challenged count III, even

though the defendant did not directly challenge the conviction on count I.

The Eighth Circuit refused to apply the doctrine where the defendant could suffer added collateral consequences from the unreviewed conviction because the court feared an unreviewed conviction would reduce the defendant's parole opportunities. United States v. Holder, 560 F.2d 953, 955-956 (8th Cir. 1977). Despite its holding in Holder, the court has not abandoned the concurrent sentence doctrine. See United States v. Darnell, 545 F.2d 595 (8th Cir. 1976), cert. denied, 429 U.S. 1104, 97 S.Ct. 1134, 51 L.Ed.2d 556 (1977) [this is perhaps the most frank consideration and application of the doctrine, for "The luxury of time is denied us"]; United States v. Eisler, 567 F.2d 814, 818 (8th Cir. 1977). There the court said (footnote omitted):

> "We affirm the conviction of both defendants on the distribution

> counts. Since the sentences on the conspiracy counts were concurrent with those on the distribution counts, we do not, in the interests of judicial economy, pass on the propriety of the conviction on the conspiracy counts."

The Tenth Circuit sometimes chooses to review all the concurrent sentences, United States v. Masters, 484 F.2d 1251, 1253 (10th Cir. 1973), especially if appellant's issue is uncomplicated. United States v. Montoya, 676 F.2d 428, 433 (10th Cir. 1982), cert. denied, 459 U.S. 856, 103 S.Ct. 124, 74 L.Ed.2d 108 (1982). Other times that court choses to apply the doctrine to preclude review where defendant's contentions relating to the two unreviewed counts "would have no effect on the sentence." United States v. Gamble, 541 F.2d 873, 877 (10th Cir. 1976).

The Eleventh Circuit sometimes refuses to apply the concurrent sentence doctrine. United States v. Rosen, 764 F.2d 763, 767 (11th Cir. 1985), cert. denied sub nomine

Holmes v. United States, ___ U.S. ___, 106 S.Ct. 806, 88 L.Ed.2d 781 (1986). There the multiple sentences were so intertwined between valid and invalid sentences and the invalid ones "could as in Rew's case, interfere with parole" and the effect on any possible future parole so uncertain that defendants Holmes', Rew's and Rosen's sentences on all valid counts were remanded for resentencing. However, that court applied the doctrine and affirmed all counts in United States v. Fuentes-Jimenez, 750 F.2d 1495, 1497 (11th Cir. 1985), rehearing denied, 779 F.2d 60, cert. denied, ___ U.S. ___, 106 S.Ct. 2282, 90 L.Ed.2d 724 (1986) [excellent discussion in figuring out that the affirmance of all convictions would not affect defendant's eligibility for parole]. The court followed the "vacation" approach of Hooper in United States v. Butera, 677 F.2d 1376, 1386 (11th

Cir. 1982), cert. denied, 459 U.S. 1108, 103 S.Ct. 735, 74 L.Ed.2d 958 (1983).

XIV. Summary of Reasons To Abolish The Doctrine

This Court should banish its and other courts' right to use the concurrent sentence doctrine, since:

(a) Such judicial practice impermissibly infringes on the Constitution's separation of powers and the prosecutorial function of the executive branch.

(b) That doctrine infringes upon and denies the appellant's right under 28 U.S.C. 1291 to have the entire conviction reviewed by a court of appeals.

(c) Upon request on direct appeal, the first appellate court has a duty to review a challenge to the insufficiency of the evidence.

(d) An appellant has a constitutional due process right to not be incarcerated in

part for any crime, which the government has failed to prove beyond a reasonable doubt.

(e) A court of appeals cannot find that it possesses the ability to predict with sufficient certainty that there will be no adverse collateral consequence to the appellant from each unreviewed conviction.

(f) It is not at all clear that the concurrent sentence doctrine, if carefully applied, actually does serve the interest of judicial economy.

(g) The overall interest of justice outweighs the policy of judicial convenience.

(h) The advantages of reviewing each conviction on its merits substantially outweigh the threatened harm from any resulting decrease in judicial efficiency.

(i) A "qualified" vacation of any convictions, like a reversal for reasons other than being not guilty, does not avoid the significant likelihood that that appellant

will actually suffer adverse collateral consequences from that unreviewed conviction. By its use of the "actual offense behavior", the Parole Commission will consider each vacated conviction in determining the offense severity rating under the parole guidelines.

(j) The court of appeals' invocation of the concurrent sentence doctrine violated petitioner Ray's Fifth Amendment right not to be deprived of liberty without due process of law. Without appellate review of this conviction under Count Three, Ray must remain incarcerated in part for a crime the government failed to prove beyond a reasonable doubt.

(k) The evidence of this petitioner's guilt of the charged Count 3 offense will not sustain that conviction.

The number of counts in the indictment and the amounts of cocaine, Ray allegedly possessed, will greatly affect the date on

which he is paroled. Thus, there is a significant likelihood that Ray's unreviewed count's "vacated" conviction will, contrary to Fifth Circuit predictions, lengthen Ray's incarceration. Therefore, it would be improper for this Court to legitimize the Fifth Circuit's application of the concurrent sentence doctrine in this case. United States v. Moynagh, 566 F.2d 799, 802 n. 3 (1st Cir. 1977), cert. denied, 435 U.S. 917, 98 S.Ct. 1475, 55 L.Ed.2d 510 (1978); United States v. Rubin, 591 F.2d 278, 281-282 (5th Cir. 1979), cert. denied, 444 U.S. 864, 100 S.Ct. 133, 62 L.Ed.2d 87 (1979); United States v. Holder, 560 F.2d 953, 955-956 (8th Cir. 1977); United States v. Escobar DeBright, 730 F.2d 1255, 1257-1260 (9th Cir. 1984) (en banc).

XV. THE RELIEF APPROPRIATE TO THIS CASE

Petitioner Ray submits that the interests of justice dictate that upon entry of the acquittal as to the Count 3 crime, this cause

be remanded to the district court for resentencing on the affirmed Counts 1 and 2. United States v. Hines, 256 F.2d 561, 564 (2nd Cir. 1958)[under the circumstances, the court thought the sentences on the good counts should be vacated with remand for full resentencing]; United States v. Rosen, 764 F.2d 763, 767 (11th Cir. 1985), cert. denied sub nomine Holmes v. United States, ___ U.S. ___, 106 S.Ct. 806, 88 L.Ed.2d 781 (1986). There the Court said:

> "Sentencing on a multi-count conviction is an interrelated and intertwined process because of the statutory provisions for concurrent and consecutive sentences. - See generally, Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C.A. § 801 et seq. Where an entire conviction is challenged on direct appeal, double jeopardy and due process are not implicated when all sentences, both proper and improper, are remanded, because of the holistic nature of the trial judge's sentencing decision. Multiple count convictions present the trial judge with the need for a sentencing scheme which takes into consideration the total offense characteristics of a defendant's

> behavior. When that scheme is disrupted because it has incorporated an illegal sentence, it is appropriate that the entire case be remanded for sentencing."

Cf. United States v. Manbeck, 744 F.2d 360, 391 (4th Cir. 1984), cert. denied, ___ U.S. ___, 105 S.Ct. 1197, ___ L.Ed.2d ___ (1985) [no remand for resentencing].

Since the trial court abused its discretion in entering its guilty judgment on Count 3, this Court must consider whether that error was of such harm as to cause the rendition of an improper judgment when the sentences were simultaneously entered on Counts 1 and 2. The question is whether there is a reasonable possibility that the trial court's erroneous belief about the evidence supporting Count 3, contributed to the punishment assessed as the sentences on counts 1 and 2. See Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Obviously, once the district court learns from

the appellate courts that Ray was not guilty of possession of six ounces of cocaine, there is a reasonable probability that the sentencing judge will desire to give Ray lower sentences on Counts 1 and 2 since this case involved only one gram of ninety-two percent pure cocaine. See Pennsylvania v. Goldhammer, ___ U.S. ___, 106 S.Ct. 353, ___ L.Ed.2d ___ (1985); United States v. DiFrancesco, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980); United States v. Rosen, supra, 764 F.2d at 767 [Holmes challenged his entire sentence on direct appeal; the court noted his sentences were interdependent, stemming from the same criminal transaction]; United States v. Colunga, 786 F.2d 655, 658-659 (5th Cir. 1986). In Colunga, while only one of the two sentences was found illegal, the court said (footnote omitted):

> "We cannot hold, however, that the proper remedy is to vacate the sentence on one count and disallow resentencing on the other. This

would result in only a five year sentence for Colunga although the sentencing judge, laboring under a false impression of the maximum sentence, expressed regret that he could sentence Colunga to just ten years. This special factor makes it inappropriate to refuse resentencing on the conviction which survives this appeal. Furthermore, because the illegality of the two conspiracy sentences is intertwined--that is, the presence of both sentences makes the entire sentencing scheme illegal—Colunga cannot put blinders on this Court by purportedly challenging only one of the sentences. Therefore, the proper remedy, for which there is strong authority in this Circuit, is to vacate both sentences and remand to the District Court for resentencing on one count. United States v. Bradsby, 628 F.2d 901, 905 (5th Cir. 1980); United States v. Mori, 444 F.2d 240, 245 (5th Cir. 1971), cert. denied, 404 U.S. 913, 92 S.Ct. 238, 30 L.Ed.2d 187 (1971); see also United States v. Winship, 724 F.2d 1116 (5th Cir. 1984). The government may select the count on which resentencing is to be based. Bradsby, 628 F.2d at 906."

This Court has the opportunity to declare that this recent line of cases, Goldhammer, DiFrancesco, Busic, Rosen, and Colunga, stand for the proposition that a defendant's

multiple sentences assessed at one time by a federal judge are a collective whole and must be viewed as a package. That principle, which can usually be applied to the prejudice of defendants, should now be applied where it may benefit Ray. This Court should declare that an appellate court ordinarily should remand the entire case for resentencing after finding error that requires reversal of one or more of multiple convictions, at least where the reversed convictions reasonably affected the sentencing determination on the affirmed convictions. Cf. Busic v. United States, 639 F.2d 940, 947-953 (3rd Cir. 1981), cert. denied, 452 U.S. 918, 101 S.Ct. 3055, 69 L.Ed.2d 422 (1981)[appellate court could remand all sentences, challenged or not, for resentencing "which may be greater than, less than, or the same as the original sentence"]. With such an opportunity for resentencing, the trial judge is usually restricted from

imposing a more severe sentence than that given originally. See Texas v. McCullough, ___ U.S. ___, 106 S.Ct. 976, ___ L.Ed.2d ___ (1986); United States v. Bello, 767 F.2d 1065 (4th Cir. 1985); United States v. Jefferson, 760 F.2d 821 (7th Cir. 1985).

CONCLUSION

This Court should hold that the court of appeals reversibly erred in invoking the concurrent sentence doctrine to decline review of Ray's conviction on Count 3 of the indictment. After reversal of the court of appeals' judgment, all counts of this case should be remanded to that court with instructions (1) to review the insufficiency claim as to the count 3 conviction; and (2) to vacate the sentences on the counts 1 and 2 convictions and remand this cause to the trial court for resentencing on the counts 1 and 2 convictions if the court of appeals finds that

there is insufficient evidence to support the count 3 conviction.

Respectfully submitted.

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JOHN WILLIAM RAY

January 13, 1987

NO. 86-281

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1986

JOHN WILLIAM RAY, Petitioner

V. UNITED STATES OF AMERICA, Respondent

ON WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

APPENDIX ATTACHED TO BRIEF FOR PETITIONER RAY

STATUTORY, REGULATORY AND RULE PROVISIONS INVOLVED

28 U.S.C. 1254(1) provides in part:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; ....

28 U.S.C. 1291 provides:

> The court of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.
> (As amended Apr. 2, 1982, Pub.L. 97-164, Title I, § 124, 96 Stat. 36.)

18 U.S.C. 3231 provides in part:

> The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

18 U.S.C. 2 provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.
> (June 25, 1948, ch 645, § 1, 62 Stat. 684; as amended Oct. 31, 1951, ch. 655, § 17b, 65 Stat. 717.)

18 U.S.C. 4205 provides in part:

> (a) Whenever confined and serving a definite term or terms of more than one year, a prisoner shall be eligible for release on parole after serving one-third of such term or terms or after serving ten years of a life sentence or of a sentence of over thirty years, except to the extent otherwise provided by law.
>
> (b) Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interest of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minumum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum

sentence of imprisonment to be served in which event the court may specify that the prisoner may be released on parole at such time as the Commission may determine.

18 U.S.C. 4206 provides:

> (a) If an eligible prisoner has substantially observed the rules of the institution or institutions to which he has been confined, and if the Commission, upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner, determines:
>
> (1) that release would not depreciate the seriousness of his offense or promote disrespect for the law; and
>
> (2) that release would not jeopardize the public welfare;
>
> subject to the provisions of subsections (b) and (c) of this section, and pursuant to guidelines promulgated by the Commission pursuant to section 4203(a)(1), such prisoner shall be released.
>
> (b) The Commission shall furnish the eligible prisoner with a written notice of its determination not later than twenty-one days, excluding holidays, after the date of the parole determination proceeding. If parole is denied such notice shall state with particularity the reasons for such denial.

(c) The Commission may grant or deny release on parole notwithstanding the guidelines referred to in subsection (a) of this section if it determines there is good cause for so doing: Provided, That the prisoner is furnished written notice stating with particularity the reasons for its determination, including a summary of the information relied upon.

(d) Any prisoner, serving a sentence of five years or longer, who is not earlier released under this section or any other applicable provision of law, shall be released on parole after having served two-thirds of each consecutive term or terms, or after serving thirty years of each consecutive term or terms of more than forty-five years including any life term, whichever is earlier: Provided, however, That the Commission shall not release such prisoner if it determines that he has seriously or frequently violated institution rules and regulations or that there is a reasonable probability that he will commit any Federal, State, or local crime.

18 U.S.C. 4207 provides:

> In making a determination under this chapter (relating to release on parole) the Commission shall consider, if available and relevant:
>
> (1) reports and recommendations which the staff of the facility in which such prisoner is confined may make;

(2) official reports of the prisoner's prior criminal record, including a report or record of earlier probation and parole experiences;

(3) presentence investigation reports;

(4) recommendations regarding the prisoner's parole made at the time of sentencing by the sentencing judge;

(5)[1] a statement, which may be presented orally or otherwise, by any victim of the offense for which the prisoner is imprisoned about the financial, social, psychological, and emotional harm done to, or loss suffered by such victim; and

(5)[1] reports of physical, mental, or psychiatric examination of the offender.

There shall also be taken into consideration such additional relevant information concerning the prisoner (including information submitted by the prisoner) as may be reasonably available.

---

[1] So in original. Two paragraphs (5) have been enacted.

21 U.S.C. 812 provides schedules of controlled substances as follows:

Establishment

(a) There are established five schedules of controlled substances, to be known as schedules I, II, III, IV, and V. Such schedules shall initially consist of the substances listed in this section. The schedules established by this section shall be updated and republished on a semiannual basis during the two-year period beginning one year after October 27, 1970 and shall be updated and republished on an annual basis thereafter.

*****

Initial schedules of controlled substances

(c) Schedules I, II, III, IV, and V shall, unless and until amended pursuant to section 811 of this title, consist of the following drugs or other substances, by whatever official name, common or usual name, chemical name, or brand name designated:

*****

Schedule II

(a) Unless specifically excepted or unless listed in another schedule, any of the following substances whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis: ...

(4) Coca leaves and any salt, compound, derivative, or preparation of coca leaves (including cocaine and ecgonine and their salts, isomers, derivatives), and salts of isomers and derivatives, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocainized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgonine.

(Pub.L. 91-513, Title II, § 202, Oct. 27, 1970, 84 Stat. 1247; Pub.L. 95-633, Title I, § 103, Nov. 10, 1978, 92 Stat. 3772; Pub.L. 98-473, Title II, §§ 507(c), 509(b), Oct. 12, 1984, 98 Stat. 2071, 2072.)

21 U.S.C. 841 provides:

Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; ....

Penalties

(b) Except as otherwise provided in section 845 or 845a of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

(i) 100 grams or more of a controlled substance in schedule I or II which is a mixture or substance containing a detectable amount of a narcotic drug other than a narcotic drug consisting of—

(I) coca leaves;

(II) a compound, manufacture, salt, derivative, or preparation of coca leaves; or

(III) a substance chemically identical thereto;

(ii) a kilogram or more of any other controlled substance in schedule I or II which is a narcotic drug;

*****

such person shall be sentenced to a term of imprisonment of not more than 20 years, a fine of not more than $250,000, or both.

*****

(B) In the case of a controlled substance in schedule I or II except as provided in subparagraphs (A) and (C), such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $125,000, or both. ***** Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

(Pub.L. 91-513, Title II, § 401, Oct. 27, 1970, 84 Stat. 1260; Pub.L. 95-633, Title II, § 201, Nov. 10, 1978, 92 Stat. 3774; Pub.L. 96-359, § 8(c), Sept. 26, 1980, 94 Stat. 1194; Pub.L. 98-473, Title II, §§ 502, 503(b)(1), (2), Oct. 12, 1984, 98 Stat. 2068, 2070.)

21 U.S.C. 846 provides:

> Any person who attempts or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the minimum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy. (Pub. L. 91-513, Title II, § 405A, as added Pub. L. 98-473, Title II, § 503(a), Oct. 12, 1984, 98 Stat. 2069.)

28 U.S.C. 2111 provides:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect substantial rights of the parties.

Fed.R.Cr.Proc. rule 52 provides:

> (a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
>
> (b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

28 C.F.R. 2.19 provides Information considered:

(a) In making a parole or reparole determination the Commission shall consider, if available and relevant:

(1) Reports and recommendations which the staff of the facility in which such prisoner is confined may make;

(2) Official reports of the prisoner's prior criminal record, including a report or record of earlier probation and parole experiences;

(3) Pre-sentence investigation reports;

(4) Recommendations regarding the prisoner's parole made at the time of sentencing by the sentencing judge and prosecuting attorney;

(5) Reports of physical, mental, or psychiatric examination of the offender; and

(6) A statement, which may be presented orally or otherwise, by any victim of the offense for which the prisoner is imprisoned about the financial, social, psychological, and emotional harm done to, or loss suffered by such victim.

(b)(1) There shall also be taken into consideration such additional relevant information concerning the prisoner (including information submitted by the prisoner) as may be reasonably available (18 U.S.C. 4207). The Commission encourages the submission of relevant information concerning an eligible prisoner by interested persons.

(2) To permit adequate review of information concerning the prisoner, materials submitted to the Commission should be received by the Commission no later than the first day of the month preceding the month of the scheduled hearing docket.

(3) If material of more than six (6), double-spaced, letter-sized pages is first submitted at the time of the hearing (or preliminary interview) and the hearing panel

(or person conducting the hearing or preliminary interview) concludes that it is not feasible to read all the material at that time, the person submitting the material will be permitted to summarize it briefly at the hearing (or preliminary interview). All of the material submitted will become part of the record to be considered by the Commission in its review of the proceedings.

(c) The Commission may take into account any substantial information available to it in establishing the prisoner's offense severity rating, salient factor score, and any aggravating or mitigating circumstances, provided the prisoner is apprised of the information and afforded an opportunity to respond. If the prisoner disputes the accuracy of the information presented, the Commission shall resolve such dispute by the preponderance of the evidence standard; that is, the Commission shall rely upon such information only to the extent that it represents the explanation of the facts that best accords with reason and probability. However, the Commission shall not consider in any determination, charges upon which a prisoner was found not guilty after trial unless:

(1) Reliable evidence is presented that was not introduced at trial (e.g., a subsequent admission or other clear indication of guilt); or

(2) The prisoner was found not guilty by reason of his mental condition....

28 C.F.R. 2.20 provides Paroling policy guidelines and a Statement of general policy:

(a) To establish a national paroling policy, promote a more consistent exercise of discretion, and enable fairer and more equitable decision-making without removing individual case consideration, the United States Parole Commission has adopted guidelines for parole release consideration.

(b) These guidelines indicate the customary range of time to be served before release for various combinations of offense (severity) and offender (parole prognosis) characteristics. The time ranges specified by the guidelines are established specifically for cases with good institutional adjustment and program progress.

(c) These time ranges are merely guidelines. Where the circumstances warrant, decisions outside of the guidelines (either above or below) may be rendered.

(d) The guidelines contain instructions for the rating of certain offense behaviors. However, especially mitigating or aggravating circumstances in a particular case may justify a decision or a severity rating different from that listed.

(e) An evaluation sheet containing a "salient factor score" serves as an aid in determining the parole prognosis (potential risk of parole violation). However, where circumstances warrant, clinical evaluation of risk may override this predictive aid.

(f) Guidelines for reparole consideration are set forth at § 2.21.

(g) The Commission shall review the guidelines, including the salient factor score, periodically and may revise or modify them at any time as deemed appropriate.

*****

GUIDELINES FOR DECISIONMAKING

[Guidelines for decisionmaking, customary total time to be served before release (including jail time)]

Offense characteristics: Severity of offense behavior	Offender characteristics: Parole prognosis (salient factor score 1981)			
	Very good (10 to 8)	Good (7 to 6)	Fair (5 to 4)	Poor (3 to 0)
	Guideline range (months)			
Category:				
1.....	<=4	<=8	8-12	12-16
2.....	<=6	<=10	12-16	16-22
3.....	<=10	12-16	18-24	24-32
4.....	12-18	20-26	26-34	34-44
5.....	24-36	36-48	48-60	60-72
6.....	40-52	52-64	64-78	78-100
7.....	52-80	64-92	78-110	100-148
8[1].....	100+	120+	150+	180+

[1] Note: For Category 8, no upper limits are specified due to the extreme variability of the cases within this category. For decisions exceeding the lower limit of the applicable guideline category by more than 48 months, the pertinent aggravating case factors considered are to be specified in the reasons given (e.g., that a homicide was premeditated or committed during the course of another felony; or that extreme cruelty or brutality was demonstrated).

CHAPTER ONE OFFENSES OF GENERAL APPLICABILITY

101 Conspiracy

Grade conspiracy in the same category as the underlying offense.

102 Attempt

Grade attempt in the same category as the offense attempted.

103 Aiding and Abetting

Grade aiding and abetting in the same category as the underlying offense.

104 Accessory After the Fact

Grade accessory after the fact as two categories below the underlying offense, but not less than Category One.

NOTE TO CHAPTER ONE: The reasons for a conspiracy or attempt not being completed may, where the circumstances warrant, be considered as a mitigating factor (e.g., where there is voluntary withdrawal by the offender prior to completion of the offense).

*****

CHAPTER NINE OFFENSES INVOLVING ILLICIT DRUGS

*****

Subchapter C—Cocaine Offenses

921 Distribution or Possession With Intent To Distribute

(a) If extremely large scale (e.g., involving 15 kilograms or more of 100% purity, or equivalent amount), grade as Category Eight [except as noted in (c) below];

(b) If very large scale (e.g., involving 5 kilograms but less than 15 kilograms of 100% purity, or equivalent amount), grade as Category Seven [except as noted in (c) below];

(c) Where the Commission finds that the offender had only a peripheral role, grade conduct under (a) or (b) as Category Six;

(d) If large scale (e.g., involving more than 1 kilogram but less than 5 kilograms of 100% purity, or equivalent amount), grade as Category Six [except as noted in (e) below];

(e) Where the Commission finds that the offender had only a peripheral role, grade conduct under (d) as Category Five;

(f) If medium scale (e.g., involving 100 grams-1 kilogram of 100% purity, or equivalent amount), grade as Category Five;

(g) If small scale (e.g., involving 5-99 grams of 100% purity, or equivalent amount), grade as Category Four;

(h) If very small scale (e.g., involving 1.0-4.9 grams of 100% purity, or equivalent amount), grade as Category Three;

(i) If extremely small scale (e.g., involving less than 1 gram of 100% purity, or equivalent amount), grade as Category Two.

922 Simple Possession

Category One.

CHAPTER THIRTEEN GENERAL NOTES AND DEFINITIONS

Subchapter A—General Notes

*****

(b) The term 'multiple separate offenses' generally refers to offenses committed at different times. However, there are certain circumstances in which offenses committed at the same time are properly considered multiple separate offenses for the purpose of establishing the offense severity rating. These include (1) unrelated offenses, and (2) offenses involving the unlawful possession of weapons during commission of another offense.

*****

SALIENT FACTOR SCORING MANUAL

The following instructions serve as a guide in computing the salient factor score.

ITEM A. PRIOR CONVICTIONS/ADJUDICATIONS (ADULT OR JUVENILE) [[None = 3; One = 2; Two or three = 1; Four or more....=0]]

A.1 In General. Count all convictions/adjudications (adult or juvenile) for criminal offenses (other than the current offense) that were committed prior to the present period of confinement, except as specifically noted. Convictions for prior offenses that are charged or adjudicated together (e.g., three burglaries) are counted as a single prior conviction, except when such offenses are separated by an intervening arrest (e.g., three convictions for larceny and a conviction for an additional larceny committed after the arrest for the first three larcenies would be

counted as two prior convictions, even if all four offenses were adjudicated together). Do not count the current federal offense or state/local convictions resulting from the current federal offense (i.e., offenses that are considered in assessing the severity of the current offense). Exception: Where the first and last overt acts of the current offense behavior are separated by an intervening federal conviction (e.g., after conviction for the current federal offense, the offender commits another federal offense while on appeal bond), both offenses are counted in assessing offense severity; the earlier offense is also counted as a prior conviction in the salient factor score.

A.2 Convictions. (a) Felony convictions are counted. Non-felony convictions are counted, except as listed under (b) and (c). Convictions for driving while intoxicated/ while under the influence/while impaired, or leaving the scene of an accident involving injury or an attended vehicle are counted. For the purpose of scoring Item A of the salient factor score, use the offense of conviction.

*****

A.6 Setting Aside of Convictions/ Restoration of Civil Rights Setting aside or removal of juvenile convictions/adjudications is normally for civil purposes (to remove civil penalties and stigma). Such convictions/adjudications are to be counted for purposes of assessing parole prognosis. This also applies to adult convictions/ adjudications which may be set aside by various methods (including pardon). However, convictions/adjudications that were set aside

or pardoned on grounds of innocence are not to be counted.

A.7 Convictions Reversed or Vacated on Grounds of Constitutional or Procedural Error. Exclude any conviction reversed or vacated for constitutional or procedural grounds, unless the prisoner has been retried and reconvicted. It is the Commission's presumption that a conviction/adjudication is valid. If a prisoner challenges such conviction he/she should be advised to petition for a reversal of such conviction in the court in which he/she was originally tried, and then to provide the Commission with evidence of such reversal. Note: Occasionally the presentence report documents facts clearly indicating that a conviction was unconstitutional for deprivation of counsel [this occurs only when the conviction was for a felony, or for a lesser offense for which imprisonment was actually imposed; and the record is clear that the defendant (1) was indigent, and (2) was not provided counsel, and (3) did not waive counsel]. In such case, do not count the conviction. Similarly, if the offender has applied to have a conviction vacated and provides evidence (e.g., a letter from the court clerk) that the required records are unavailable, do not count the conviction. Note: If a conviction found to be invalid is nonetheless supported by persuasive information that the offender committed the criminal act, this information may be considered as a negative indicant of parole prognosis (i.e., a possible reason for overriding the salient factor score).

28 C.F.R. 2.35 provides Mandatory release in the absence of parole:

(a) A prisoner shall be mandatorily released by operation of law at the end of the sentence imposed by the court less such good time deductions as he may have earned through his behavior and efforts at the institution of confinement. If released pursuant to 18 U.S.C. 4164, such prisoner shall be released, as if on parole, under supervision until the expiration of the maximum term or terms for which he was sentenced less 180 days. If released pursuant to 18 U.S.C. 4205(f), such prisoner shall remain under supervision until the expiration of the maximum term or terms for which he was sentenced. Insofar as possible, release plans shall be completed before the release of any such prisoner.

(b) It is the Commission's interpretation of the statutory scheme for parole and good time that the only function of good time credits is to determine the point in a prisoner's sentence when, in the absence of parole, the prisoner is to be conditionally released on supervision, as described in subsection (a). Once an offender is conditionally released from imprisonment, either by parole or mandatory release, the good time earned during that period of imprisonment is of no further effect either to shorten the period of supervision or to shorten the period of imprisonment which the offender may be required to serve for violation of parole or mandatory release.

(c) A prisoner committed under the Youth Corrections Act must be initially released conditionally under supervision not later than two years before the expiration of the term imposed by the court.

Parole Rule 2.20-04 provides:

> 2.20-04. Offense Severity Rating. In applying the guidelines, the offense severity rating shall reflect the overall circumstances of the present offense behavior. Select the offense rating appropriate to the actual offense behavior that occurred. The severity rating must be explained on the Notice of Action Worksheet (in the space provided) by a brief summary of the specific facts that justified the rating. 28 C.F.R. 2.19(c) provides: "The Commission may take into account any substantial information available to it in establishing the prisoner's offense severity rating, salient factor score, and any aggravating or mitigating circumstances, provided the prisoner is apprised of the information and afforded an opportunity to respond. If the prisoner disputes the accuracy of the information presented, the Commission shall resolve such dispute by the preponderance of the evidence standard; that is, the Commission shall rely upon such information only to the extent that it represents the explanation of the facts that best accords with reason and probability. However, the Commission shall not consider in any determination charges upon which a prisoner was found not guilty after trial unless reliable information is presented that was not introduced into evidence at such trial (e.g., a subsequent admission or other clear indication of guilt)."

Information in the file describing offense circumstances more severe than

reflected by the offense of conviction (for example, information contained in a count of an indictment that was dismissed as a result of a plea agreement) may be relied upon to select an appropriately higher severity rating only if such information meets the standard indicated in 28 C.F.R. 2.19(c). The normal indicants of reliability are (a) the report is specific as to the behavior alleged to have taken place; (b) the allegation is corroborated by established facts; and (c) the source of the allegation appears credible. The prisoner is to be informed of the allegation at the hearing and given an opportunity to respond. An allegation that is vague, unsupported, or comes from an unreliable source should not be considered. Cases requiring further information or verification may be referred to the Regional Office.

The Commission's consideration of aggravating offense circumstances in applying its guidelines has been approved in the following cases: Zannino v. Arnold, 531 F.2d 687 (3d Cir. 1976) [allegation that offense was a "large-scale conspiracy" committed in an "unusually sophisticated" manner]; Brown v. Lundgren, 528 F.2d 1050 (5th Cir. 1976) [circumstances not given in the opinion but involved pattern of ongoing criminal behavior and multiple separate offenses]; Grattan v. Sigler, 525 F.2d 329 (9th Cir. 1975) [allegation that the prisoner was a "ringleader"]; Foddrell v. Sigler, 418 F.Supp. 324 (M.D. Pa. 1976) ["sophisticated operation involving large amounts of heroin"]; and Biancone v. Norton, 421 F.Supp. 1044 (D. Conn. 1976)

[multiple separate offenses]; and in the cases cited below. Similarly, Commission's consideration of unadjudicated offenses has been approved in the following cases: Pilliteri v. United States Board of Parole, 541 F.2d 938 (2nd Cir. 1976) [offense rated as extortion based on information in the pre-sentence report; the Court specifically rejected the contention that the Government's acceptance of a plea restricted to the conspiracy charge was a bar to the Commission from considering the actual offense behavior]; Bistram v. U.S. Parole Board, 535 F.2d 329 (5th Cir. 1976) [Commission relied upon dismissed count of kidnapping notwithstanding bargained plea to bank robbery only]; Lupo v. Norton, 371 F.Supp. 156 (D. Conn. 1974) [prisoner convicted of conspiracy to transport stolen goods was alleged to have committed robbery to obtain same]; and Manos v. U.S. Board of Parole, 399 F.Supp. 1103 (M.D. Pa. 1975). [Prisoner pleaded guilty to two counts of filing false tax reports involving less than $20,000 but Commission considered entire 22-count indictment charging a total defrauding of $150,000]. These decisions have accorded to the Parole Commission the same scope of discretion as that exercised by the sentencing courts. As stated in Billiteri, supra, at 444:

> "If therefore, the sentencing judge is not limited to a consideration of only that criminal conduct of the defendant that is related to the offense for which he was convicted, the Parole Board, which is concerned with all facets of a prisoner's character, make-up and behavior, is

a fortiori, certainly entitled to be fully advised of the contents of the presentence report and to use it in giving an offense severity rating and for such other purposes as it finds necessary and proper..."

Parole Rule 2.20-05 provides:

2.20-05 Decisions Outside the Guidelines
A. In General. 18 U.S.C. 4206 provides that the Commission may render a decision outside the guidelines for good cause provided the prisoner is furnished a specific explanation for such action. It is in the Commission's discretion to render a decision outside the guidelines (whether above or below) provided the circumstances warrant and such decision is adequately explained. The reasons given in the Notice of Action for a decision above or below the guidelines must explain what specific facts were relied upon to distinguish that case from the "typical" cases for which the guidelines are set. If a decision outside the guidelines follows the recommendation of the sentencing judge, the prosecutor or another interested party, it is not sufficient to cite that recommendation as the reason for departure from the guidelines. Instead, the Notice of Action must state the reasoning and factual basis for the recommendation which was found to justify a decision outside the guidelines.

The following are examples of situations in which a decision outside the guidelines appropriately may be considered. This does not mean that these are the only situations in which a

decision outside the guidelines may be considered. Nor does it mean that a decision outside the guidelines is mandated for every such case.

Each of the following examples sets forth the Commission's reason for its decision and the specific facts primarily relied upon in support of that reason. Avoid sweeping or ambiguous phrases as well as irrelevant facts. Be specific enough with the facts described so that a person not familiar with the case will know what you are talking about.

B. Decisions Above the Guidelines

[Examples 1-3: Aggravating Offense Factors]

1. Aggravated nature of the offense behavior:

. . .because of the aggravated nature of your offense behavior: victims were repeatedly beaten and threatened during the offense . . .

MOTION

(5)

Supreme Court, U.S.
FILED
FEB 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-281

In the Supreme Court of the United States

OCTOBER TERM, 1986

JOHN WILLIAM RAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION TO VACATE AND REMAND

CHARLES FRIED
Solicitor General
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17pp

QUESTION PRESENTED

Whether the court of appeals erred by invoking the concurrent sentence doctrine to vacate one of petitioner's convictions.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-281

JOHN WILLIAM RAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION TO VACATE AND REMAND

Pursuant to Rule 42 of the Rules of this Court, the Solicitor General, on behalf of the United States, respectfully moves this Court to vacate the judgment of the court of appeals and remand the case for further proceedings.

OPINION BELOW

The opinion of the court of appeals (Pet. App. A3-A25) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 1986. A petition for rehearing was denied on June 25, 1986 (Pet. App. A56). The petition for a writ of certiorari was filed on August 20, 1986, and was granted on November 17, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was found guilty of conspiracy to possess cocaine with intent to dis-

tribute it, in violation of 21 U.S.C. 846; possession of one gram of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); and possession of six ounces of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Petitioner was sentenced to concurrent seven-year prison terms on each of the three counts and concurrent five-year terms of special parole on the two substantive counts. In addition, the court imposed a $50 assessment on each count pursuant to 18 U.S.C. (Supp. III) 3013. See 2 Tr. 341-342.

1. The evidence adduced at trial showed that on May 29, 1985, petitioner's co-defendant Pablo Arturo Sandoval asked Edelmiro Molina whether Molina knew anyone who was interested in buying cocaine (1 Tr. 83). Molina said he did (*id.* at 84). Molina, who was an informant for the Drug Enforcement Administration (DEA), contacted DEA agent Jane Herber, informed her of the conversation, and agreed to cooperate with the DEA in its investigation of Sandoval (*id.* at 28-31, 84-85).

Later that day, Molina and Sandoval went to petitioner's apartment (1 Tr. 87, 154). Petitioner and Sandoval left the living room of the apartment, went into the bedroom, and talked for about five minutes. Sandoval returned and sat down in the living room. Petitioner then came back into the living room and tossed a small bag of cocaine to Sandoval. In petitioner's presence, Sandoval told Molina that the bag contained a sample for sale and testing by customers. *Id.* at 88-89. When Sandoval and Molina left the apartment, Sandoval told Molina to call his buyer and set up a meeting (*id.* at 90). Molina called Agent Herber, who was posing as a cocaine buyer, and arranged to meet with her that afternoon. Sandoval drove Molina to the meeting in a truck obtained from petitioner and sold the cocaine sample to Herber for $105. *Id.* at 31-37, 91-95.[1]

[1] The bag was found to contain one gram of 92% pure cocaine (1 Tr. 36-37; 2 Tr. 188).

At the time she purchased the sample, Agent Herber told Sandoval that she was interested in buying 10 ounces of cocaine (1 Tr. 37, 94-95). Sandoval and Molina then returned to petitioner's apartment, where Sandoval handed petitioner the money Agent Herber had paid for the cocaine sample. Petitioner gave some of the money back to Sandoval. *Id.* at 96-97. Sandoval told petitioner that the buyer wanted an additional 10 ounces of cocaine; petitioner said that he had three ounces of the drug and would have to see if he could obtain the additional seven ounces. *Id.* at 97-98. As Sandoval and Molina left petitioner's apartment, Molina saw petitioner drive away (*id.* at 98). Later that day, Sandoval called Agent Herber and told her that he had six ounces of cocaine that he would sell for $1950 per ounce (*id.* at 41). Sandoval failed to appear at a meeting scheduled for that night; he subsequently arranged to meet Herber the next day to consummate the sale. *Id.* at 41-46, 101-103.

The following day, May 30, 1985, Sandoval, again driving the truck obtained from petitioner (1 Tr. 48), picked up Molina and took him to Sandoval's apartment where Sandoval removed six ounces of cocaine from a drawer (*id.* at 104). Sandoval said that "they hadn't come up with the ten ounces, just only six" (*id.* at 105). Sandoval and Molina then met with Agent Herber. When Sandoval handed Herber the six ounces of cocaine, Agent Herber gave a signal, and the surveillance agents arrested Sandoval (*id.* at 49-50).[2] Petitioner was arrested several weeks later (2 Tr. 193).

2. The court of appeals affirmed petitioner's conspiracy conviction and his conviction for possession of one gram of cocaine. It found that there was sufficient evidence to support these convictions (Pet. App. A11-A16) and rejected petitioner's challenges to two of the district court's evidentiary rulings (*id.* at A18-A24).

[2] The cocaine was found to be 92% pure (2 Tr. 189).

With respect to the conviction for possession of six ounces of cocaine, the court "appl[ied] the concurrent sentence doctrine to decline review of the sufficiency of the evidence" (Pet. App. A16). The court observed that the sentences on the two possession counts were concurrent and stated that its "affirmance of the conviction on [one of the possession counts] makes review of the [second possession] conviction unnecessary" (*id.* at A16-A17). In order "to avoid * * * potential adverse collateral consequences," the court vacated petitioner's second possession conviction (*id.* at A17). The court said that its action "in no way alters the jury's verdict or the conviction" as its "effect * * * is to suspend imposition of the sentence[]" (*ibid.*).

INTRODUCTION AND SUMMARY OF ARGUMENT

The concurrent sentence doctrine holds that when a defendant is convicted of several offenses and receives concurrent sentences, a court of appeals need not in every case consider the defendant's challenges to each of the convictions. If the court finds that one of the convictions is proper and that the other convictions are not likely to subject the defendant to additional adverse collateral consequences, the court may invoke the doctrine to decline to address the defendant's claims that the other convictions are invalid. The doctrine is thus a rule designed to promote judicial efficiency, sparing appellate courts the burden of adjudicating issues whose resolution will have no practical impact on the defendant.

As its name suggests, the concurrent sentence doctrine applies only when two or more convictions carry sentences that are entirely concurrent. The sentence on the conviction whose validity is upheld by the appellate court must encompass all of the punishment imposed upon the defendant; no additional penalty may flow from the sentences imposed on the convictions that are not reviewed by the court of appeals.

The court of appeals in this case applied the concurrent sentence doctrine with respect to petitioner's two convictions for the substantive offense of possession of cocaine with intent to distribute it. The court reviewed the conviction for possession of one gram of cocaine and upheld that conviction on the merits; the court then applied the concurrent sentence doctrine to vacate the conviction for possession of six ounces of cocaine. In our memorandum in opposition to the petition for a writ of certiorari in this case, we expressed the belief, shared by petitioner and the court of appeals, that the sentences imposed upon petitioner for those two convictions were entirely concurrent. Closer examination of the record has revealed that the district court did not simply sentence petitioner to concurrent seven-year terms of imprisonment and concurrent five-year terms of special parole on those convictions. The court also imposed a $50 monetary assessment on each count pursuant to 18 U.S.C. (Supp. III) 3013, a recently-enacted statute requiring that a monetary assessment be imposed on a convicted defendant in every federal criminal case.

In view of the separate $50 assessments imposed on each of these two counts, it was error for the court of appeals to treat the sentences as concurrent. Because of the absence of concurrent sentences, the court could not properly invoke the concurrent sentence doctrine. We therefore agree with petitioner that the judgment of the court of appeals should be vacated and the case remanded so that the court of appeals may review the sufficiency of the evidence to support petitioner's conviction on Count 3 of the indictment.

ARGUMENT

THE CONCURRENT SENTENCE DOCTRINE SHOULD NOT HAVE BEEN INVOKED IN THIS CASE

1. The concurrent sentence doctrine may be invoked by an appellate court only when a defendant is convicted on two or more counts and receives concurrent sentences. In *Hirabayashi* v. *United States*, 320 U.S. 81 (1943), for example, this Court stated that "[s]ince the sentences of three months each imposed by the district court on the two counts were ordered to run concurrently, it will be unnecessary to consider questions raised with respect to the first count if we find that the conviction on the second count * * * must be sustained" (320 U.S. at 85). After determining that "[t]he conviction under the second count [was] without constitutional infirmity," the Court declined to review the defendant's challenges to the validity of the other conviction. *Id.* at 105; see also *Andresen* v. *Maryland*, 427 U.S. 463, 469 n.4 (1976) (citation omitted) (noting that if two of the counts for which the defendant received concurrent sentences were not affected by the defendant's constitutional claim, the Court could "apply the discretionary concurrent-sentence doctrine, and thereby decline to consider [the defendant's] constitutional claims"); *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973) (citation omitted) ("[a]lthough affirmance of [the defendant's] conviction on two of the six counts carrying identical concurrent sentences does not moot the issues he raises pertaining to the remaining counts, we decline as a discretionary matter to reach these issues").[1]

[1] The roots of the doctrine lie in cases in which a single general sentence was imposed for more than one conviction. *Claasen* v. *United States*, 142 U.S. 140, 146-147 (1891) ("it is settled law in this Court, and in this country generally, that in any criminal case a general verdict and judgment on an indictment or information containing several counts cannot be reversed on error if any one of the counts is good and warrants the judgment, because, in the absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only"); *Locke* v. *United States*, 11 U.S. (7 Cranch) 339 (1813); see generally *Benton* v. *Maryland*, 395 U.S. 784, 788-789 (1969).

The premise underlying the concurrent sentence doctrine is that consideration by the appellate court of the defendant's challenges to each of several convictions carrying concurrent sentences is unnecessary because the resolution of those claims will have no practical effect on the punishment imposed upon the defendant. If the sentence imposed on the unreviewed count adds in any way to the penalty imposed on the reviewed count, the doctrine is inapplicable. In that setting, the failure to review the conviction carrying the additional penalty will prejudice the defendant by depriving him of an opportunity to overturn the additional penalty. Cf. *Benton* v. *Maryland*, 395 U.S. 784, 799-800 (1969) (White, J., concurring); *id.* at 801-802 (Harlan, J., dissenting).

The courts of appeals have adopted different approaches in applying the concurrent sentence doctrine. Some courts simply decline to review the conviction carrying a concurrent sentence, leaving undisturbed the district court's judgment relating to that conviction. See, *e.g.*, *United States* v. *Nightingale*, 703 F.2d 17, 19 (1st Cir. 1983); *United States* v. *Gordon*, 634 F.2d 639, 643 (1st Cir. 1980); *United States* v. *Lampley*, 573 F.2d 783, 788 (3d Cir. 1978); *United States* v. *Nelson*, 733 F.2d 364, 371 n.17 (5th Cir.), cert. denied, 469 U.S. 937 (1984); *United States* v. *Wilson*, 671 F.2d 1138, 1139-1140 n.2 (8th Cir.), cert. denied, 456 U.S. 994 (1982); *United States* v. *Kirk*, 723 F.2d 1379, 1381-1382 (8th Cir. 1983), cert. denied, 466 U.S. 930 (1984); *United States* v. *Fuentes-Jiminez*, 750 F.2d 1495, 1497 (11th Cir. 1985), cert. denied, No. 85-6330 (June 2, 1986). Other courts vacate the portion of the district court's judgment relating to the unreviewed conviction. See, *e.g.*, *United States* v. *Adi*, 759 F.2d 404,

409-410 (5th Cir. 1985); *United States* v. *Butera*, 677 F.2d 1376, 1386 (11th Cir. 1982), cert. denied, 459 U.S. 1108 (1983); *United States* v. *Durant*, 648 F.2d 747, 752 (D.C. Cir. 1981); *United States* v. *Hooper*, 432 F.2d 604, 606 (D.C. Cir. 1970). All of these courts recognize that the presence of concurrent sentences is an essential prerequisite for the invocation of the doctrine.

2. We agree with petitioner that the court of appeals erred by invoking the concurrent sentence doctrine in this case. Although we believe that the concurrent sentence doctrine is a valid means of conserving scarce judicial resources, the sentences imposed by the district court in this case were not concurrent, and the concurrent sentence doctrine therefore could not properly be applied.[4]

Congress in 1984 enacted 18 U.S.C. (Supp. III) 3013, which provides that a district court "shall assess on any person convicted of an offense against the United States" specified monetary charges (18 U.S.C. (Supp. III) 3013(a)). The court must assess $25 where an individual is convicted of a misdemeanor and $50 if the individual is convicted of a felony (*ibid.*).[5]

The record in this case reveals that, in addition to sentencing petitioner to prison and parole terms, the district court imposed $50 assessments upon petitioner on each of the three counts on which petitioner was convicted. The court stated that "on each one of these [counts] I am going to impose a $50 assessment as required by law, to each one of these counts" (2 Tr. 342). The unreviewed

[4] In our view, a court of appeals may invoke the doctrine to decline to review – and leave undisturbed – a conviction carrying a concurrent sentence if "the unreviewed conviction foreseeably will have no significant adverse consequences for the [defendant]" (*Benton* v. *Maryland*, 395 U.S. at 802 (Harlan, J., dissenting)). For reasons that we discuss below (at pages 12-13), however, it is unlikely that these requirements can now be satisfied in federal criminal cases.

[5] The statute specifies higher penalties "if the defendant is a person other than an individual" (18 U.S.C. (Supp. III) 3013(a)(1)(B) and (2)(B)).

conviction for possession of cocaine with the intent to distribute thus carried a $50 assessment that was separate and distinct from – and cumulative of – the $50 assessment on the reviewed possession conviction.[6]

Although the amount of the assessment imposed on each count is small, it plainly is sufficient to render the sentences cumulative rather than concurrent. See *Pinkus* v. *United States*, 436 U.S. 293, 304-305 (1978) (sentences "were not in fact fully concurrent" where the prison terms were identical but "the $500 fines on each of the counts were cumulative"; the Court observed that the defendant "had at least a pecuniary interest in securing review of his conviction on each of the counts"). For that reason, the concurrent sentence doctrine is inapplicable in this case. Because the court of appeals erred by invoking the concurrent sentence doctrine to decline to review the sufficiency of the evidence supporting petitioner's conviction on Count 3 of the indictment, the judgment of the court of appeals should be vacated and the case remanded for further proceedings.

3. We do not believe that the proper disposition of the case is affected by the fact that the court of appeals followed its practice of invoking the concurrent sentence

[6] The Judgment and Commitment Order signed by the district judge stated, "The Court * * * imposes a $50.00 special monetary assessment on Counts 1, 2, and 3, pursuant to 18 U.S.C. 3013." Although the cumulative nature of the assessments is not completely clear from the order, the specific terms of the court's oral pronouncement of sentence plainly resolve any ambiguity regarding the amount of the assessment. See *United States* v. *Tafoya*, 757 F.2d 1522, 1529-1530 (5th Cir. 1985), cert. denied, No. 85-5074 (Oct. 21, 1985); *United States* v. *Moyles*, 724 F.2d 29, 30 (2d Cir. 1983); *United States* v. *McDonald*, 672 F.2d 864, 866 (11th Cir. 1982).

Both petitioner and the court of appeals appear to have overlooked the $50 assessments: both characterized the sentences in this case as concurrent. This portion of the sentences also was not apparent from the materials available to us at the time we prepared our memorandum in opposition to the petition for a writ of certiorari.

doctrine to vacate the judgment of conviction on the unreviewed count. Petitioner argues in this Court (Br. 40-43) that the concurrent sentence doctrine did not authorize the court of appeals to vacate his conviction. In order to affirm the judgment of the court of appeals, therefore, this Court would have to conclude that the court of appeals properly invoked the concurrent sentence doctrine to vacate the conviction. That conclusion is not possible on this record.

Even if the concurrent sentence doctrine authorizes a court of appeals to vacate a judgment that supports a fully concurrent sentence, the doctrine plainly confers no authority to vacate a judgment when that judgment supports a non-concurrent sentence. The basis for the view that a court of appeals may vacate a judgment of conviction that carries a concurrent sentence is the determination that "vacation of such a judgment 'does not impair any need of government, avoids the possibility of adverse collateral consequences to defendant, and furthers the general interest of the administration of justice.' " *United States* v. *Cardona*, 650 F.2d 54, 58 (5th Cir. 1981), quoting *United States* v. *Hooper*, 432 F.2d at 606; see also *United States* v. *Adi*, 759 F.2d at 409-410. Thus, the court of appeals' decision in this case was premised on its assumption that petitioner's "sentence on count three is to run concurrently with that on count two" and that therefore "the review of the count three conviction [was] unnecessary" (Pet. App. A16-A17).

As we have discussed, however, the district court imposed separate $50 monetary assessments upon petitioner in connection with each of these two counts. The two counts were not concurrent in this respect because they did not subject petitioner to a single monetary assessment of $50; they instead imposed a total monetary assessment of $100. And vacating the judgment did impair a "need of the government" because it reduced by $50 the total monetary

assessment imposed upon petitioner. Under the court of appeals' own theory, therefore, it was error to invoke the concurrent sentence doctrine to vacate one of petitioner's convictions.

Moreover, we agree with petitioner (Br. 40-43) that the practice of vacating convictions is improper even where the sentences on two convictions are entirely concurrent. It is the responsibility of the Executive Branch to conduct criminal prosecutions and to select the charges to be filed.[7] Just as a court may not interfere with the government's decision as to the charges to bring against a defendant, a court may not vacate a judgment of conviction unless that result is necessary to vindicate a constitutional or statutory right. Cf. *United States* v. *Hasting*, 461 U.S. 499, 505-507 (1983). Any other rule would allow at the end of the criminal process the very result that is prohibited at the beginning—judicial interference with the government's discretion to select the charges to be pressed against a defendant. See *United States* v. *De Bright*, 730 F.2d 1255, 1257 (9th Cir. 1984) (en banc); see also *United States* v. *Carrasco*, 786 F.2d 1452, 1455-1456 (9th Cir. 1986) (district court could not dismiss the indictment on the ground that it could impose an "appropriate" sentence based on the remaining count).

An appellate court's decision to vacate a judgment of conviction is fundamentally different from a decision not to review that judgment. As one court of appeals has observed, "convictions represent the expenditure of society's resources in the investigation and prosecution of criminal conduct" (*United States* v. *De Bright*, 730 F.2d at 1257). The judgments entered by district courts are pre-

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[7] See *Ball* v. *United States*, 470 U.S. 856, 859-860 (1985); *United States* v. *Goodwin*, 457 U.S. 368, 382 (1982); *United States* v. *Batchelder*, 442 U.S. 114, 124 (1979); *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978); *United States* v. *Nixon*, 418 U.S. 683, 694 (1974); *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 457-459 (1868).

sumptively valid. Indeed, one of the basic premises of our system of appellate review is that an appellate court will not affirmatively interfere with the judgment of a lower court unless it finds error in the process that culminated in that judgment. In our view, an appellate court exceeds its proper role when it vacates a judgment of conviction simply on the basis of its conclusion that the conviction is superfluous and therefore not needed in the public interest.[6]

4. Although not directly relevant to the disposition of petitioner's case, we note that the impact of Section 3013 upon the concurrent sentence doctrine is likely to be much broader than its effect in this particular case. Section 3013 does not expressly state whether monetary assessments must be separately imposed for each count on which the defendant is convicted, but the three courts of appeals that

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[6] The application of the doctrine to vacate an unreviewed judgment places the conviction underlying that judgment in a procedural no man's land, the contours of which are extremely ill-defined. The courts of appeals that follow this procedure generally direct the vacation of the "judgment," but also invariably state that neither the jury verdict nor the conviction is destroyed and that sentence may be reimposed at a later date in the event that a defect is discovered in the conviction affirmed by the court of appeals. Some courts of appeals analogize the procedural status of a conviction with a vacated judgment to that of a conviction upon which the district court has suspended sentence. See Pet. App. A16-A17; *United States* v. *Hooper*, 432 F.2d at 606 n.8.

When the imposition of sentence is suspended, the conviction remains on the defendant's record; the district court simply decides not to impose a sentence for that conviction. See 18 U.S.C. 3578, 3651. Even where an unreviewed conviction is vacated, therefore, the conviction may remain available for purposes collateral to the criminal proceeding, such as enhancement of punishment for subsequent criminal conduct or impeachment of the defendant's credibility in a subsequent trial. Since courts adopted the practice of vacating unreviewed convictions because they believed that all potential for adverse collateral consequences would be eliminated, and the practice may not accomplish that result, no advantage is gained by embarking into these uncharted procedural waters.

have addressed the issue all have held that assessments must be separately imposed on each count. See *United States* v. *Dobbins*, 807 F.2d 130 (8th Cir. 1986); *United States* v. *Donaldson*, 797 F.2d 125 (3d Cir. 1986); *United States* v. *Pagan*, 785 F.2d 378, 381 (2d Cir. 1986). That interpretation is consistent with the legislative history of the statute, in which the special assessment is characterized as a charge of $25 "for a misdemeanor conviction" and $50 "for a felony conviction." S. Rep. 98-497, 98th Cong., 2d Sess. 13 (1984); see also 130 Cong. Rec. H12086 (daily ed. Oct. 10, 1984) (section-by-section analysis submitted by Congressman Rodino).

If that interpretation of the statute is correct, and we believe it is, the practical effect of Section 3013 will be to abolish the concurrent sentence doctrine in all federal criminal cases. Because the monetary assessment is mandatory, it must be imposed in every case. And because Section 3013 requires separate cumulative assessments on each count on which the defendant is convicted, there will be no federal criminal case in which the sentences are truly concurrent. Thus, the monetary assessments required under Section 3013 will in every case preclude the invocation of the concurrent sentence doctrine.

CONCLUSION

The judgment of the court of appeals should be vacated, and the case remanded for further proceedings in light of the separate monetary assessments imposed by the district court.

Respectfully submitted.

CHARLES FRIED
Solicitor General

FEBRUARY 1987

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OPPOSITION

BRIEF

No. 86-281

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PETITION FOR CERTIORARI FILED AUG. 20, 1986
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IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1986

No. 86-281

JOHN WILLIAM RAY, PETITIONER

V.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S MOTION OPPOSING THE SOLICITOR GENERAL'S MOTION TO VACATE AND REMAND SINCE THE COURT SHOULD EXAMINE INDEPENDENTLY THE MERITS OF THE QUESTION PRESENTED ON CERTIORARI

Pursuant to Rule 42.4 of the Rules of this Court, Petitioner Ray respectfully moves this Court: (1) to deny the Solicitor General's Motion To Vacate and Remand; and (2) to examine independently the merits of the question presented for review in this case.

SUMMARY OF ARGUMENT

Petitioner's goal at this Court is to obtain a reversal on all counts of the judgment below. The Solicitor General has concluded this case merits such relief. The procedural issue is whether Ray will be disposed of with or without resolution of its question presented. Petitioner submits the often recurring nature of this question makes it imperative to all concerned that this Court now finally resolve this appellate procedural quagmire. One wonders if the end justified the means.

ARGUMENT

I. Historical perspective

The question presented in this certiorari was noted as not being before this Court in Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). Three times since Benton, however, this Court has declared this question to be

"cert. worthy." Rubin v. United States, 439 U.S. 810, 99 S.Ct. 67, 58 L.Ed.2d 102 (1978); Mariscal v. United States, 449 U.S. 405, 101 S.Ct. 909, 66 L.Ed.2d 616 (1981); and Ray v. United States, ____ U.S. ____, 107 S.Ct. 454, ____ L.Ed.2d ____ (1986).

In Rubin and Mariscal, the Solicitor General deftly capitulated there were errors below. This Court granted certiorari and remanded each case for further consideration.

In Ray,, the Solicitor General has again chosen to try to make the "Ray question presented" disappear from this Court's docket. See February 1987 Motion To Vacate And Remand this Ray case.

Despite the Solicitor General's conduct in Rubin and Mariscal, most of the federal circuit courts continue to employ the concurrent sentence doctrine to more quickly process appeals in criminal cases. If Ray

disappears with a remand order of a few sentences, who will know what the parties and the Court have recognized was illegally done below in this case and in many other cases. That doctrine's use since Benton has caused great suffering and additional actual incarceration periods for appellants in numerous criminal cases.

The federal Bench and Bar need this Court's clarification of the law in this area. It is imperative that once and for all this Court address and resolve the merits of this Ray issue. The multiple facets of this issue have been well briefed by the parties. Its resolution by this Court will have far reaching effects on the present intercircuit conflicts over the doctrine's use.

Faced with the Solicitor General's pending motion, review of this Court's Rubin and Mariscal opinions is essential. What

have the federal Bench and Bar learned about the merits of the Ray question when it was presented to and resolved by this Court in its brief published orders in Rubin and Mariscal. Rubin and Mariscal do not inform anyone that it is both unconstitutional and illegal for the federal appellate judiciary to use the concurrent sentence doctrine in any case in this country! In Rubin, this Court ruled over Justice Rehnquist's dissent that:

> Oct. 2, 1978. On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Petition for writ of certiorari granted, judgment vacated and case remanded to the Court of Appeals for further consideration in light of the position presently asserted by the Solicitor General in his supplemental brief filed August 21, 1978.

In Mariscal, this Court ruled over Justices White and Rehnquist's dissent that:

Jan. 19, 1981. PER CURIAM.

This case arises on a petition for certiorari to the United States Court of Appeals for the Ninth Circuit, which affirmed petitioner's conviction on 10 counts of interstate transportation of property obtained by fraud, in violation of 18 U.S.C. § 2314, and on 12 counts of mail fraud, in violation of 18 U.S.C. § 1341. 626 F.2d 868. The court affirmed the interstate transportation convictions on the merits, and declined to address the "rather complex issues" presented by the mail fraud convictions, invoking the discretionary "concurrent sentence" doctrine. App. to Pet. for Cert. 6-7; see Barnes v. United States, 412 U.S. 837, 848, n. 16, 93 S.Ct. 2357, 2364, n. 16, 37 L.Ed.2d 380 (1973); Benton v. Maryland, 395 U.S. 784, 787-793, 89 S.Ct. 2056, 2058-2062, 23 L.Ed.2d 707 (1969). In light of the Solicitor General's concession in this Court that the mail fraud convictions were invalid, Memorandum in Opposition 4-5, we grant the motion of petitioner for leave to proceed in forma pauperis, grant certiorari, vacate the judgment of the Ninth Circuit affirming the mail fraud convictions, and remand for reconsideration of the applicability of the "concurrent sentence" doctrine to a conviction

conceded by the United States to be erroneous.

It is so ordered.

However, that Mariscal opinion contains the following dissenting views:

> Justice WHITE dissents, essentially for the reasons stated by Justice REHNQUIST in his dissenting opinion.
>
> Justice REHNQUIST dissenting:
>
> There is a certain irony in the fact that I authored for the Court the opinion in United States v. Maze, 414 U.S. 395, 94 S.Ct. 645, 38 L.Ed.2d 603 (1974), which affirmed an opinion written by the present Solicitor General when he was a judge for the Court of Appeals for the Sixth Circuit reversing certain mail fraud convictions. Nonetheless, I think that a more important principle is at stake here than whether or not the mail fraud convictions are proper. That larger issue is whether this Court should mechanically accept any suggestion from the Solicitor General that a decision rendered in favor of the Government by a United States Court of Appeals was in error, and vacate the conviction and request that the Government present its "confession of error" to the Court of Appeals which it had earlier

persuaded to affirm the conviction.

One may freely concede that with 93 United States Attorneys and 11 Courts of Appeals, there will be differing views as between prosecutors, as well as between prosecutors and courts, as to legal issues presented in criminal cases. But the Executive is one branch of the Government, and the Judiciary another. The Office of the Solicitor General, while having earned over the years a reputation for ability and expertise in presenting the Government's claims to this Court, is nonetheless a part of the Executive Branch of the Federal Government, not of the Judicial Branch. I think it ill behooves this Court to defer to the Solicitor General's suggestion that a Court of Appeals may have been in error after another representative of the Executive Branch and the Justice Department has persuaded the Court of Appeals to reach the result which it did.

The Office of the Solicitor General may be quite faithfully performing its obligations under our system by calling our attention to what it perceives to be errors in the decisions of the courts of appeals. But I harbor serious doubt that our adversary system of justice is well served by this Court's practice of

routinely vacating judgments which the Solicitor General questions without any independent examination of the merits on our own. With the increasing caseloads of all federal courts, there is a natural temptation to "pass the buck" to some other court if that is possible. Congress has given us discretionary jurisdiction to deny certiorari if we do not wish to grant plenary consideration to a particular case, a benefit that other federal courts do not share, but it has not to my knowledge moved the Office of the Solicitor General from the Executive Branch of the Federal Government to the Judicial Branch. Until it does, I think we are bound by our oaths either to examine independently the merits of a question presented for review on certiorari, or in the exercise of our discretion to deny certiorari. Because the Court exercises neither of these alternatives here, I dissent.

II. Troublesome Questions

The Government's proposed disposition of this case raises seven troublesome questions.

First, why did the Court decide to exercise its discretion to grant review in

this case? The facts of this case are surely not unique. The Circuit Court's conduct gives rise to an issue of general and recurring significance. There is a conflict among the federal circuits on how the broad question presented should be resolved. There is a need for a bright line decision. See Petitioner's Br. 83-86. There were sufficient reasons for adding the Ray case to this Court's already overcrowded docket. In Ray, this Court now has the opportunity awaited since 1969 in Benton by the Bench, Bar and numerous scholars. See law review articles noted by Petitioner (Br. 56, 83, 84, 92 and 93).

Second, in part "3" of the Motion To Vacate And Remand, the Solicitor General agrees with Petitioner's analysis that the Circuit Court's vacation was unconstitutional under the separation of powers doctrine. (Br. 40-43.) But in its

disposition of Ray, how will this Court inform the nation's other Circuit Courts that such Hooper vacation is really unconstitutional? Of course, this Court could in two sentences state: "We have reviewed the Court of Appeals opinion and find it to be sound. We therefore adopt as our own, without further comment, the holding and reasoning behind the abolition of the concurrent sentence doctrine in United States v. Escobar DeBright, 730 F.2d 1255 (9th Cir. 1984)." Thus, "the bell will have tolled" for the concurrent sentence doctrine. It will have been permanently abolished from the federal appellate courts for the right reasons.

Third, is the federal adversary system of justice best served when this Court examines independently the merits of a question presented for review on certiorari? The checks and balances in our

constitutional system sometime conflict with the goals of judicial economy. Which should win? Recognizing the importance of the separation of powers doctrine, one wonders if this Court should have a practice of automatically reversing and vacating all judgments which the Solicitor General suggests may have been reached in error by the lower courts.

Fourth, is the question presented here "cert. worthy"? "Yes" ruled this Court by granting certiorari on November 17, 1986. With the merits now briefed, this case is ready for resolution. Its question has been ripe since 1969. Its question contains serious sub-issues that this Court should address. See Petitioner's Br. at 103-109. Should not the newly emerging "whole pie" theory of federal sentencing apply to Ray so the judgment and sentence on all convictions will be remanded for full resentencing under

the doctrines of Pennsylvania v. Goldhammer, ___ U.S. ___, 106 S.Ct. 353, ___ L.Ed.2d ___ (1985); United States v. DiFrancesco, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980); United States v. Hines, 256 F.2d 561 (2nd Cir. 1958); Busic v. United States, 639 F.2d 940, 947-953 (3rd Cir. 1981), cert. denied, 452 U.S. 918, 101 S.Ct. 3055, 69 L.Ed.2d 422 (1981).

Fifth, "Winning is everything," isn't it? While Coach Lombardi so taught his students, Petitioner and his counsel would prefer "Winning for the right reasons." What will be the retroactive effect of Ray under the Solicitor General's concessions? None, unless this case leaves the Court's docket only after judicial analysis of why the Fifth Circuit erred. Yet, the Ray issue's resolution involves at least telling the lower judiciary that Hooper vacation unconstitutionally infringes on the

executive branch's prosecution function and that branch's interest in retaining as final only legal convictions. There are new major wrinkles to the law on retrospective application of new constitutional rules of criminal procedure. See Griffin v. Kentucky, ___ U.S. ___, 107 S.Ct. 708, ___ L.Ed.2d ___ (1987). While disposing of Ray, this Court should continue its enlightened approach, reiterating that:

> First, the principle that this Court does not disregard current law, when it adjudicates a case pending before it on direct review, applies regardless of the specific characteristics of the particular new rule announced.
>
> *****
>
> Second, the use of a "clear break" exception creates the same problem of not treating similarly situated defendants the same.
>
> *****
>
> We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state

> or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a "clear break" with the past.

Id., ___ U.S., at ___, 107 S.Ct., at 715-716, ___ L.Ed.2d, at ___.

Otherwise, the concurrent sentence doctrine will continue to be unconstitutionaly invoked by unaware appellate judges. Its many past victims are found throughout the criminal justice system. How many future victims will it claim? How will this Court's Ray decision affect those others similarly situated. Most of those others may not be able to afford counsel to return to this Court the questions previously presented in Ray, Mariscal and Rubin. If another petitioner similarly situated gets certiorari granted, what authority can he or she cite from this court? What is to become of those criminal appellants whose counsel do not timely

recognize the Ray issue and the Parole Commission's use of convictions unreviewed when an appellate court employs the concurrent sentence doctrine? The money and efforts expended in the future to re-invent the wheel [the Ray question and brief] need not be expended if this Court would release a full enough opinion that all can see the bright line. Such disposition would be the efficient use of judicial resources.

Sixth, should not this Court now declare that "resolution of evidentiary sufficiency" is such a substantial question that a challenge to the sufficiency of the evidence should be considered before disposing of a case even though reversal may be based on another ground? Petitioner Ray suggests (Br. 46-49) that his is a proper case for this Court to declare that upon timely presentation, a defendant has a due process right to have the first appellate

court determine whether he has been convicted of each element of his crime with proof beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 n. 12, 99 S.Ct. 2781, 2789 n. 12, 61 L.Ed.2d 560 (1979); and In Re Winship, 397 U.S. 358, 362-365, 90 S.Ct. 1068, 1071-1073, 25 L.Ed.2d 368 (1970). In Selman v. State, 663 S.W.2d 838, 840 (Tex.Cr.App. 1984), the court said:

> It now appears that in light of Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); Greene v. Massey, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978), a challenge to the sufficiency of the evidence should be considered before disposing of a case even though reversal may be based on another ground.

Petitioner respectfully requests this Court to promulgate the Selman doctrine as the law of the land. Because Due Process requires sufficient evidence to support a conviction, neither the harmless error statute, 28

U.S.C. 2111, nor Fed. Rules Cr. Proc. 52, prevent this Court from determining that sufficiency claims must be reviewed at the first appellate level.

Seventh, is a concession of error by one Solicitor General ever binding precedent on how that same or future Solicitor General will subsequently posit the U.S. Government's view on the same issue at this Court? See Ray (86-281 Memo in Opp. at 5 n. 3) where this Solicitor General deftly argued that his office's prior positions in Rubin and Mariscal were inapposite. Is the Government's position for just one case or for all appellants similarly situated? Are all circuit courts bound by the various Solicitor General's concessions in Rubin, Mariscal and Ray? Until the law on this issue is the same throughout the Nation, a published thorough opinion from this Court is required to guarantee that future

Solicitor Generals will maintain the Government's present posture that the Fifth Circuit violated the United States Constitution in its use of the concurrent sentence doctrine's Hooper variation of vacating convictions into a no man's land. The curious reviewer may also ask if this Solicitor General should have conceded much more in Ray in light of Rubin, Mariscal and the sound reasoning and holding in United States v. Escobar DeBright, 730 F.2d 1255 (9th Cir. 1984) (en banc).

How else, from what the Ray parties and this Court do, will the Fifth Circuit have the guidance to properly resolve this case upon remand?

CONCLUSION

As to all counts, the judgment of the court of appeals should be vacated, and the entire case remanded for further proceedings, not in light of the Solicitor

General's special assessment theory, but in light of the numerous reasons set out in the merits brief for Petitioner.

Respectfully submitted for Petitioner.

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February 20, 1987

THE STATE OF TEXAS, COUNTY OF HIDALGO

BEFORE ME, the undersigned authority, appeared JOSEPH A. CONNORS III, who being by me duly sworn did depose and state on his oath the following:

> My name is Joseph A. Connors, III. I am petitioner's counsel of record. About 9:15 a.m. on February 19, 1987, I personally began reading the Solicitor General's Motion To Vacate And Remand. About 10:45 p.m. on February 19, 1987, I had a lengthy phone conversation with petitioner John William Ray. After complete disclosure about said "Motion To Vacate and Remand" and a proposed response in opposition from petitioner's counsel, petitioner Ray stated that he authorized attorney Connors to file the foregoing type motion, seeking this Court's independent examination of the merits of the question on certiorari.

Joseph A. Connors III

JOSEPH A. CONNORS III

SWORN TO AND SUBSCRIBED before me on this the 20th day of February, 1987.

Notary Public for
The State of Texas

REPLY BRIEF

Supreme Court, U.S.
FILED
FEB 26 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-281

In the Supreme Court of the United States

OCTOBER TERM, 1986

JOHN WILLIAM RAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

CHARLES FRIED
Solicitor General
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REPLY MEMORANDUM FOR THE UNITED STATES

We find petitioner's opposition to our motion to vacate somewhat puzzling. As we discuss in the motion (at 8-9), the court of appeals' decision in this case rests upon a factual premise that is plainly wrong: review of the record makes clear that the sentences imposed upon petitioner are not concurrent. Because that error was not detected by petitioner and was not apparent to us at the time we opposed the certiorari petition, this Court granted review on the assumption that the case properly presented a question of general importance regarding the application of the concurrent sentence doctrine. No such question in fact is presented here, however, because regardless of whether the doctrine has continuing validity as a general matter, it is indisputable that the court below erred by applying the doctrine with respect to *non-concurrent* sentences.

In these circumstances, it seems clear to us that the appropriate course of action is to remand the case to the court of appeals so that court may reconsider its decision in light of the true state of the record. Alternatively, this Court could hold that the concurrent sentence doctrine may not be applied to non-concurrent sentences and direct

the court of appeals to address the merits of petitioner's challenge to the sufficiency of the evidence to support his conviction on Count 3 of the indictment. The Court frequently vacates and remands a case where an intervening change in the law alters the posture of the case. See, *e.g.*, *Thomas* v. *Outboard Marine Corp.*, No. 85-1735 (Dec. 8, 1986); *United States Department of the Treasury* v. *Galioto*, No. 84-1904 (June 27, 1986). We think the same approach is appropriate where (1) the record makes clear that the facts of the case are not what they were believed to be when the court of appeals rendered its decision and when this Court granted certiorari, and (2) the question on which this Court granted certiorari simply is not presented on the facts as they actually appear in the record.

Petitioner argues that the Court should take the extraordinary step of proceeding to plenary consideration of the question presented even though its determination regarding that question could not possibly alter the proper disposition of this case. For whatever the Court might conclude regarding the validity of the concurrent sentence doctrine, petitioner is entitled to consideration by the court of appeals of his challenge to the sufficiency of the evidence to support his conviction. Thus, on the facts of this case the Court would never have to reach the question presented in the certiorari petition and, moreover, any statement regarding the general validity of the doctrine would be dictum because discussion of that issue would not be necessary to the decision of this case.

For the foregoing reasons, and the reasons stated in our motion, it is therefore respectfully submitted that the motion to vacate and remand should be granted.

CHARLES FRIED
Solicitor General

FEBRUARY 1987

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RESPONDENT'S

BRIEF

(6)

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QUESTION PRESENTED

Whether the court of appeals erred by invoking the concurrent sentence doctrine to vacate one of petitioner's convictions.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-281

JOHN WILLIAM RAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A3-A25) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 1986. A petition for rehearing was denied on June 25, 1986 (Pet. App. A56). The petition for a writ of certiorari was filed on August 20, 1986, and was granted on November 17, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was found guilty of conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846; possession of one gram of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); and possession of six ounces of cocaine with intent to distribute it, in violation of 21

U.S.C. 841(a)(1). Petitioner was sentenced to concurrent seven-year prison terms on each of the three counts and concurrent five-year terms of special parole on the two substantive counts. In addition, the court imposed a $50 assessment on each count pursuant to 18 U.S.C. (Supp. III) 3013 (see 2 Tr. 341-342).

1. The evidence at trial showed that between May 29, and May 30, 1985, petitioner was involved in a cocaine transaction in the Rio Grande Valley area of south Texas. On May 29, petitioner's co-defendant, Pablo Arturo Sandoval, asked Edelmiro Molina whether Molina knew anyone who was interested in buying cocaine (1 Tr. 83). Molina said that he did (*id.* at 84). Molina, who was an informant for the Drug Enforcement Administration (DEA), contacted DEA agent Jane Herber, informed her of the conversation, and agreed to cooperate with the DEA in its investigation of Sandoval (*id.* at 28-31, 84-85).

Later that day, Molina and Sandoval went to petitioner's apartment (1 Tr. 87, 154). Petitioner and Sandoval left the living room of the apartment, went into the bedroom, and talked for about five minutes. Sandoval returned and sat down in the living room. Petitioner then came back into the living room and tossed a small bag of cocaine to Sandoval. In petitioner's presence, Sandoval told Molina that the bag contained a sample for sale and testing by customers. *Id.* at 88-89. When Sandoval and Molina left the apartment, Sandoval told Molina to call his buyer and set up a meeting (*id.* at 90). Molina called Agent Herber, who was posing as a cocaine buyer, and arranged to meet with her that afternoon. Sandoval drove Molina to the meeting in a truck obtained from petitioner and sold the cocaine sample to Herber for $105. *Id.* at 31-37, 91-95.[1]

[1] The bag was found to contain one gram of 92% pure cocaine (1 Tr. 36-37; 2 Tr. 188).

At the time she purchased the sample, Agent Herber told Sandoval that she was interested in buying ten ounces of cocaine (1 Tr. 37, 94-95). Sandoval and Molina then returned to petitioner's apartment, where Sandoval handed petitioner the money Agent Herber had paid for the cocaine sample. Petitioner gave some of the money back to Sandoval. *Id.* at 96-97. Sandoval told petitioner that the buyer wanted an additional ten ounces of cocaine; petitioner said that he had three ounces of the drug and would have to see if he could obtain the additional seven ounces. *Id.* at 97-98. As Sandoval and Molina left petitioner's apartment, Molina saw petitioner drive away (*id.* at 98). Later that day, Sandoval called Agent Herber and told her that he had six ounces of cocaine that he would sell for $1950 per ounce (*id.* at 41). Sandoval failed to appear at a meeting scheduled for that night; he subsequently arranged to meet Herber the next day to consummate the sale. *Id.* at 41-46, 101-103.

The following day, May 30, Sandoval, again driving the truck obtained from petitioner (1 Tr. 48), picked up Molina and took him to Sandoval's apartment where Sandoval removed six ounces of cocaine from a drawer (*id.* at 104). Sandoval said that "they hadn't come up with the ten ounces, just only six" (*id.* at 105). Sandoval and Molina then met with Agent Herber. When Sandoval handed Herber the six ounces of cocaine, Agent Herber gave a signal, and the surveillance agents arrested Sandoval (*id.* at 49-50).[2] Petitioner was arrested several weeks later (2 Tr. 193).

2. The court of appeals affirmed petitioner's conspiracy conviction and his conviction for possession of one gram of cocaine. It found that there was sufficent evidence to support those convictions (Pet. App. A11-A16), and it rejected petitioner's challenges to two of the district court's evidentiary rulings (*id.* at A18-A24).

[2] The cocaine was found to be 92% pure (2 Tr. 189, 191).

With respect to the conviction for possession of six ounces of cocaine, the court "appl[ied] the concurrent sentence doctrine to decline review of the sufficiency of the evidence" (Pet. App. A16). The court observed that the sentences on the two possession counts were concurrent and stated that its "affirmance of the conviction on [one of the possession counts] makes review of the [second possession] conviction unnecessary" (*id.* at A16-A17). In order "to avoid * * * potential adverse collateral consequences," the court vacated petitioner's second possession conviction (*id.* at A17). The court said that its action "in no way alters the jury's verdict or the conviction" as its "effect * * * is to suspend imposition of the sentence[]" (*ibid.*).

INTRODUCTION AND SUMMARY OF ARGUMENT

The concurrent sentence doctrine holds that when a defendant is convicted of several offenses and receives concurrent sentences, a court of appeals need not in every case consider the defendant's challenges to each of the convictions. If the court finds that one of the convictions is proper and that the other convictions are not likely to subject the defendant to additional adverse collateral consequences, the court may invoke the doctrine to decline to address the defendant's claims that the other convictions are invalid. The doctrine is thus a rule designed to promote judicial efficiency, sparing appellate courts the burden of adjudicating issues whose resolution will have no practical impact on the defendant.

As its name suggests, the concurrent sentence doctrine applies only when two or more convictions carry sentences that are entirely concurrent. The sentence on the conviction whose validity is upheld by the appellate court must encompass all of the punishment imposed upon the defendant; no additional penalty may flow from the sentences imposed on the convictions that are not reviewed by the court of appeals.

The court of appeals' decision in this case rests upon a factual premise that is demonstrably wrong: review of the record makes clear that the sentences imposed upon petitioner are not concurrent. The court of appeals reviewed petitioner's conviction for possession of one gram of cocaine with intent to distribute it and upheld that conviction on the merits; the court then applied the concurrent sentence doctrine to vacate petitioner's conviction for possession of six ounces of cocaine with intent to distribute it. But the district court did not simply sentence petitioner to concurrent seven-year terms of imprisonment and concurrent five-year terms of special parole on the two substantive convictions. The court also imposed a $50 monetary assessment on each count pursuant to 18 U.S.C. (Supp. III) 3013, a recently-enacted statute requiring that a monetary assessment be imposed on a convicted defendant in every federal criminal case. In view of the separate, cumulative $50 assessments imposed on each of those two counts, the sentences on the two counts plainly are not concurrent.

Because the court of appeals' error was not detected by petitioner and was not apparent to us at the time we opposed the certiorari petition, this Court granted review on the assumption that this case properly presented a question of general importance regarding the application of the concurrent sentence doctrine. No such question in fact is presented here, however, because regardless of whether the concurrent sentence doctrine has continuing validity as a general matter, it is indisputable that the court below erred by applying the doctrine with respect to *non-concurrent* sentences. For that reason, petitioner is en-

titled to the vacation of the judgment of the court of appeals and a remand to permit that court to consider his challenge to the unreviewed conviction.

In the event the Court chooses to consider the broader question regarding the validity of the concurrent sentence doctrine, the Court should reaffirm that an appellate court may apply the doctrine to decline to review a conviction when it determines that the unreviewed conviction is not likely to result in adverse collateral consequences for the defendant. The courts of appeals have developed two different procedures for applying this doctrine. Under one approach, the court of appeals vacates the judgment of conviction on the unreviewed count. In our view, this procedure is plainly wrong. It is contrary to important separation of powers principles, it devalues the role of juries and district courts, and it places the unreviewed conviction in an unclear procedural status that is likely to lead to future complications and uncertainty.

The second procedure for implementing the concurrent sentence doctrine is the method used in the past by this Court: the appellate court may decline to review a conviction if the unreviewed conviction will not have any significant adverse collateral consequences for the defendant. The potential adverse consequences that may flow from a conviction have been identified by this Court: delay in the defendant's eligibility for parole, an increased sentence under a recidivist statute for a future offense, the availability of the conviction to impeach the defendant's character or credibility in future proceedings, and the stigma resulting from the additional conviction.

Adverse collateral consequences generally are the result of the fact of conviction, not the number of convictions. If at least one conviction may properly be imposed upon the defendant, a court frequently may be able to find the possibility of additional adverse consequences to be quite remote, because the defendant will not be subjected to

incremental collateral consequences as a result of the additional conviction. If a court determines that such consequences are not likely to arise in a particular case, the court may apply the concurrent sentence doctrine and decline to consider the defendant's challenge to the additional conviction.

Even if the Court chooses to address this broader question and concludes that the concurrent sentence doctrine may be applied in some circumstances, it is clear that the court below erred by applying the doctrine in connection with petitioner's non-concurrent sentences. The judgment of the court of appeals therefore should be vacated and the case remanded so that the court of appeals may review the sufficiency of the evidence to support petitioner's conviction on Count 3 of the indictment.

ARGUMENT

THE COURT OF APPEALS ERRED BY INVOKING THE CONCURRENT SENTENCE DOCTRINE IN THIS CASE

We agree with petitioner that the court of appeals erred by applying the concurrent sentence doctrine in this case. And we agree that this Court should direct the court of appeals to consider petitioner's claim that his conviction on Count 3 of the indictment was not supported by sufficient evidence. We reach this conclusion on somewhat different grounds from petitioner, however. In our view, the concurrent sentence doctrine is inapplicable in this case not because of some basic flaw in the doctrine itself, but for the simple reason that the sentences in this case were not concurrent. Although we believe that point is sufficient to dispose of this case, we discuss the broader question of the validity of the concurrent sentence doctrine in the event the Court wishes to address that issue here.

A. The Concurrent Sentence Doctrine May Not Be Invoked When The Sentences Are Not Concurrent

The premise underlying the concurrent sentence doctrine is that consideration by an appellate court of a defendant's challenges to each of several convictions carrying concurrent sentences is unnecessary because the resolution of those claims will have no practical effect on the defendant's punishment. If the sentence imposed on the unreviewed count adds in any way to the penalty imposed on the reviewed count, the doctrine is inapplicable. In that setting, the failure to review the conviction carrying the additional penalty will prejudice the defendant by depriving him of an opportunity to overturn the additional penalty. See, *e.g.*, *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973) (noting the existence of "identical concurrent sentences" before invoking the doctrine); *Hirabayashi* v. *United States*, 320 U.S. 81, 85 (1943) (same); cf. *Benton* v. *Maryland*, 395 U.S. 784, 799-800 (1969) (White, J., concurring); *id.* at 801-802 (Harlan, J., dissenting). Because the sentences imposed by the district court in this case were not fully concurrent, the court of appeals erred by applying the concurrent sentence doctrine.

Congress in 1984 enacted 18 U.S.C. (Supp. III) 3013, which provides that a district court "shall assess on any person convicted of an offense against the United States" specified monetary charges (18 U.S.C. (Supp. III) 3013(a)). The court must assess $25 when an individual is convicted of a misdemeanor and $50 if the individual is convicted of a felony (*ibid.*).[3]

[3] The statute specifies higher penalties "if the defendant is a person other than an individual" (18 U.S.C. (Supp. III) 3013(a)(1)(B) and (2)(B)).

The record in this case reveals that, in addition to sentencing petitioner to prison and parole terms, the district court imposed $50 assessments on each of the three counts on which petitioner was convicted. The court stated that "on each one of these [counts] I am going to impose a $50 assessment as required by law, to each one of these counts" (2 Tr. 342). The unreviewed conviction for possession of cocaine with the intent to distribute thus carried a $50 assessment that was separate and distinct from—and cumulative of—the $50 assessment on the reviewed possession conviction.[4]

Although the amount of the assessment imposed on each count is small, it plainly is sufficient to render the sentences cumulative rather than concurrent. See *Pinkus* v. *United States*, 436 U.S. 293, 304-305 (1978) (sentences "were not in fact fully concurrent" where the prison terms were identical but "the $500 fines on each of the counts were cumulative"; the Court observed that the defendant "had at least a pecuniary interest in securing review of his conviction on each of the counts"). For that reason, the concurrent sentence doctrine is inapplicable in this case. Because the court of appeals erred by invoking the concur-

[4] The Judgment and Commitment Order signed by the district judge stated, "The Court * * * imposes a $50.00 special monetary assessment on Counts 1, 2, and 3, pursuant to 18 U.S.C. 3013." Although the cumulative nature of the assessments is not completely clear from the order, the specific terms of the court's oral pronouncement of sentence plainly resolve any ambiguity regarding the amount of the assessment. See *United States* v. *Tafoya*, 757 F.2d 1522, 1529-1530 (5th Cir. 1985), cert. denied, No. 85-5074 (Oct. 21, 1985); *United States* v. *Moyles*, 724 F.2d 29, 30 (2d Cir. 1983); *United States* v. *McDonald*, 672 F.2d 864, 866 (11th Cir. 1982).

Both petitioner and the court of appeals appear to have overlooked the $50 assessments: both characterized the sentences in this case as concurrent. This portion of the sentences also was not apparent from the materials available to us at the time we prepared our memorandum in opposition to the petition for a writ of certiorari.

rent sentence doctrine to decline to review the sufficiency of the evidence supporting petitioner's conviction on Count 3 of the indictment, the judgment of the court of appeals should be vacated and the case remanded for further proceedings.

B. The Concurrent Sentence Doctrine Authorizes A Reviewing Court To Decline To Review A Conviction That Is Not Likely To Have Adverse Collateral Consequences For The Defendant

Statutory developments have greatly limited the practical importance of the broader question in this case regarding the continuing vitality of the concurrent sentence doctrine. As we have discussed, Congress in 1984 enacted 18 U.S.C. (Supp. III) 3013, which requires the imposition of monetary assessments upon convicted defendants. Section 3013 does not expressly state whether an assessment must be separately imposed for each count on which the defendant is convicted, but the three courts of appeals that have addressed the issue all have held that assessments must be separately imposed on each count. See *United States* v. *Dobbins*, 807 F.2d 130 (8th Cir. 1986); *United States* v. *Donaldson*, 797 F.2d 125 (3d Cir. 1986); *United States* v. *Pagan*, 785 F.2d 378, 381 (2d Cir. 1986). That interpretation is consistent with the legislative history of the statute, in which the special assessment is characterized as a charge of $25 "for a misdemeanor conviction" and $50 "for a felony conviction." S. Rep. 98-497, 98th Cong., 2d Sess. 13 (1984); see also 130 Cong. Rec. H12086 (daily ed. Oct. 10, 1984) (section-by-section analysis submitted by Congressman Rodino).

If that interpretation of the statute is correct, and we believe it is, the practical effect of Section 3013 will be to abolish the concurrent sentence doctrine in federal criminal cases. Because the monetary assessment is mandatory, it must be imposed in every case. And because Section 3013 requires separate cumulative assessments on

each count on which the defendant is convicted, there should be few, if any, federal criminal cases in which the sentences are fully concurrent.[5] Thus, the monetary assessments required under Section 3013 will in virtually every case preclude the invocation of the concurrent sentence doctrine.

Petitioner does not base his challenge to the vitality of the concurrent sentence doctrine upon either the effect of Section 3013 or the non-concurrent nature of the sentences imposed in his case. We do not believe it is necessary for the court to address the grounds petitioner raises in challenging the judgment of the court of appeals. Nonetheless, if the Court puts aside the effect of Section 3013 in this case and addresses the question of the validity of the concurrent sentence doctrine in general, we believe that the Court should reaffirm the rule that an appellate court may decline to review a conviction when it determines that the unreviewed conviction is not likely to result in adverse collateral consequences for the defendant.

1. *The Concurrent Sentence Doctrine, Which Has Long Been Recognized By This Court, Furthers The Important Policy Of Conserving Judicial Resources*

a. The roots of the modern-day concurrent sentence doctrine lie in the earliest decisions of this Court. *Locke* v. *United States*, 11 U.S. (7 Cranch) 339 (1813), was an action brought by the United States under the customs laws to condemn the cargo carried in a particular vessel.

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[5] The only federal cases in which sentences will be concurrent will be those in which the district court neglects to impose the mandatory Section 3013 assessments. Or, perhaps, in the relatively small number of cases under the Assimilative Crimes Act, 18 U.S.C. 13 (see *United States* v. *Mayberry*, 774 F.2d 1018 (10th Cir. 1985)). Of course, Section 3013 has no impact upon state criminal proceedings, and the doctrine therefore would remain available in state or federal court proceedings involving the review of state convictions. In addition, a future Congress could repeal Section 3013, which would permit concurrent sentences to arise again in the federal system.

Although the charge filed by the government consisted of 11 separate counts, the district court entered a single, general judgment directing that the cargo be forfeited to the United States. This Court declined to consider the cargo owner's challenges to all 11 counts of the charge. Chief Justice Marshall's opinion for the Court stated that "[t]he Court • • • is of the opinion, that the 4th count is good, and this renders it unnecessary to decide on the others." 11 U.S. (7 Cranch) at 344; see also *Snyder* v. *United States*, 112 U.S. 216, 217 (1884).

In *Claassen* v. *United States*, 142 U.S. 140 (1891), the Court applied the same rule in the context of a criminal prosecution. The defendant had been convicted of five counts of embezzlement; the district court imposed a general sentence of six years in prison. After upholding the defendant's conviction on one of the counts, the Court stated, "[t]his count and the verdict of guilty returned upon it being sufficient to support the judgment and sentence, the question of the sufficiency of the other counts need not be considered" (142 U.S. at 146). The Court observed that "it is settled law in this Court, and in this country generally, that in any criminal case a general verdict and judgment on an indictment or information containing several counts cannot be reversed on error, if any one of the counts is good and warrants the judgment, because, in the absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only" (*id.* at 146-147).[6]

The final step in the evolution of the concurrent sentence doctrine occurred in *Hirabayashi* v. *United States*, *supra*. The defendant in that case was convicted on

[6] The Court repeatedly applied this rule in criminal cases. See, e.g., *Whitfield* v. *Ohio*, 297 U.S. 431, 438 (1936); *Sinclair* v. *United States*, 279 U.S. 263, 299 (1929); *Abrams* v. *United States*, 250 U.S. 616, 619 (1919); *Goode* v. *United States*, 159 U.S. 663, 669 (1895); *Evans* v. *United States*, 153 U.S. 608, 609 (1894); *Evans* v. *United States*, 153 U.S. 584, 595 (1894).

two separate counts of an indictment. This Court stated that "[s]ince the sentences of three months each imposed by the district court on the two counts were ordered to run concurrently, it will be unnecessary to consider questions raised with respect to the first count if we find that the conviction on the second count • • • must be sustained" (320 U.S. at 85). After determining that "[t]he conviction under the second count is without constitutional infirmity," the Court declined to review the defendant's challenges to the validity of the other conviction (*id.* at 105).[7]

Over the next 20 years, the Court frequently applied this rule when concurrent sentences had been imposed upon the defendant, limiting its review to ascertaining the validity of one of the convictions. See, *e.g.*, *United States* v. *Romano*, 382 U.S. 136, 138 (1965); *United States* v. *Gainey*, 380 U.S. 63, 65 (1965); *Lanza* v. *New York*, 370 U.S. 139, 151-152, n.1 (1962) (Brennan, J., concurring); *Barenblatt* v. *United States*, 360 U.S. 109, 115 (1959); *Lawn* v. *United States*, 355 U.S. 339, 359 (1958); *Roviaro* v. *United States*, 353 U.S. 53, 59 n.6 (1957); *United States* v. *Sheridan*, 329 U.S. 379, 381 (1946); *Pinkerton* v. *United States*, 328 U.S. 640, 641-642 n.1 (1946).

That was the state of the law at the time of the Court's decision in *Benton* v. *Maryland*, *supra*. The defendant in *Benton* had been convicted of both larceny and burglary, and had been sentenced to 15 years' imprisonment on the burglary count and five years' imprisonment on the larceny count. The Court granted certiorari to consider whether the defendant's larceny conviction violated the Double Jeopardy Clause.[8] Before addressing that ques-

[7] The Court had applied the rule in this context prior to the decision in *Hirabayashi*, but had not expressly discussed the reasons for that result. *United States* v. *Johnson*, 319 U.S. 503, 518 (1943); *Gorin* v. *United States*, 312 U.S. 19, 33 (1941); *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 402 (1927); *Brooks* v. *United States*, 267 U.S. 432, 441 (1925); *Pierce* v. *United States*, 252 U.S. 239, 252-253 (1920).

[8] The defendant had been convicted of burglary and acquitted of the larceny in his first trial, but the results of that trial were set aside

tion, however, the Court considered a jurisdictional issue. It noted that reversal of the defendant's larceny conviction alone would not alter the term of the defendant's confinement and observed that "[t]he language used in a number of th[e] Court's opinions might be read to indicate that the existence of a valid concurrent sentence removes the necessary elements of a justiciable controversy" (395 U.S. at 788).

The Court traced the development of the concurrent sentence doctrine and concluded that "the existence of concurrent sentences does not remove the elements necessary to create a justiciable case or controversy" (395 U.S. at 790). It found that the possibility that the defendant might suffer adverse collateral consequences from the second conviction—even if the possibility was a "remote one"—was sufficient to render the case justiciable (*id.* at 791). The Court acknowledged, however, that "[t]he concurrent sentence rule may have some continuing validity as a rule of judicial convenience," stating that "in certain circumstances a federal appellate court, as a matter of discretion, might [be able to] decide * * * that it is 'unnecessary' to consider all the allegations made by a particular party" (*ibid.* (footnote omitted)).

Justice White joined the opinion for the Court in *Benton* and stated in a concurring opinion that the concurrent sentence doctrine "should be preserved as a matter of proper judicial administration both on direct appeal and collateral attack" (395 U.S. at 800). Justice Harlan, writing for himself and Justice Stewart in dissent, also sought to "emphasize" that "the concurrent sentence rule does have continuing vitality as an element of judicial discretion, and that appellate courts may decline to review a conviction carrying a concurrent sentence when another

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because of a constitutional defect in the State's jury selection procedures (395 U.S. at 785-786).

"concurrent" conviction has been reviewed and found valid and the unreviewed conviction foreseeably will have no significant adverse consequences for the appellant" (*id.* at 801-802). Justice Harlan observed that "the concurrent sentence doctrine plays a significant role in conserving the time and energy of appellate courts. To require that these already overworked courts invariably review in full detail each of several convictions carrying concurrent sentences seems to me senselessly doctrinaire" (*id.* at 802 (footnotes omitted)).

In the years since *Benton*, the Court has recognized that the concurrent sentence doctrine may be applied as a rule of judicial economy in the manner advocated by Justices White and Harlan. In *Barnes* v. *United States*, *supra*, the defendant had been convicted on two counts of possessing stolen United States Treasury checks, two counts of forging the checks, and two counts of uttering the checks with the knowledge that the endorsements were forged. This Court considered and rejected the defendant's challenges to the convictions for possessing stolen checks. It then stated that "[a]lthough affirmance of petitioner's conviction on two of the six counts carrying identical concurrent sentences does not moot the issues he raises pertaining to the remaining counts, we decline as a discretionary matter to reach these issues." 412 U.S. at 848 n.16 (citation omitted); see also *Andresen* v. *Maryland*, 427 U.S. 463, 469 n.4 (1976) (citation omitted) (noting that if two of the counts for which the defendant received concurrent sentences were not affected by the defendant's constitutional claim, the Court could "apply the discretionary concurrent-sentence doctrine, and thereby decline to consider petitioner's constitutional claims").

The courts of appeals also have generally continued to recognize some form of the concurrent sentence doctrine. See *United States* v. *Nightingale*, 703 F.2d 17, 19 (1st Cir. 1983); *United States* v. *Gordon*, 634 F.2d 639, 643 (1st

Cir. 1980); *United States* v. *Vargas*, 615 F.2d 952, 960 (2d Cir. 1980); *United States* v. *Lampley*, 573 F.2d 783, 788 (3d Cir. 1978); *United States* v. *Truong Dinh Hung*, 629 F.2d 908, 931 (4th Cir. 1980) (Russell & Hall, JJ., concurring and dissenting), cert. denied, 454 U.S. 1144 (1982); *United States* v. *Nelson*, 733 F.2d 364, 371 n.17 (5th Cir.), cert. denied, 469 U.S. 937 (1984); *United States* v. *Grunsfeld*, 558 F.2d 1231 (6th Cir.), cert. denied, 434 U.S. 872 (1977); *United States* v. *Peters*, 617 F.2d 503, 506 (7th Cir. 1980); *United States* v. *Tanner*, 471 F.2d 128, 140 (7th Cir.), cert. denied, 409 U.S. 949 (1972); *United States* v. *Kirk*, 723 F.2d 1379, 1381-1382 (8th Cir. 1983), cert. denied, 466 U.S. 930 (1984); *United States* v. *Hopkins*, 716 F.2d 739, 749 (10th Cir. 1982); *United States* v. *Fuentes-Jimenez*, 750 F.2d 1495, 1497 (11th Cir. 1985), cert. denied, No. 85-6330 (June 2, 1986); *United States* v. *Durant*, 648 F.2d 747, 752 (D.C. Cir. 1981); *United States* v. *Hooper*, 432 F.2d 604, 606 (D.C. Cir. 1970); but see *United States* v. *De Bright*, 730 F.2d 1255 (9th Cir. 1984) (en banc).

b. The policy considerations underlying the concurrent sentence doctrine are as important today as they were when the doctrine was created. The principal policy justification for the rule is that it promotes the efficient use of judicial resources. As Justice White has observed,

> [i]n a time of increasingly congested judicial dockets, often requiring long delays before trial and upon appeal, judicial resources have become scarce. Where a man has been convicted on several counts and sentenced concurrently upon each, and where judicial review of one count sustains its validity, the need for review of the other counts is not a pressing one since, regardless of the outcome, the prisoner will remain in jail for the same length of time under the count upheld. Rather than permit other cases to languish while careful review of these redundant counts is carried to its futile conclusion, judicial resources might be better employed by moving on to more pressing business. This is not a rule of convenience to the judge, but rather of fairness to other litigants.

Benton v. *Maryland*, 395 U.S. at 798-799 (concurring opinion); see also *Jones* v. *Zimmerman*, 805 F.2d 1125, 1128 (3d Cir. 1986) ("[t]he practice [of declining review pursuant to the concurrent sentence doctrine] is eminently practical and conserves judicial resources for more pressing needs"); *United States* v. *Hooper*, 432 F.2d at 606.

The statistical table appended to this brief demonstrates that the caseload of the federal courts of appeals has grown at an enormous rate over the last 30 years. The number of criminal cases per appellate judge has increased from 14 to 53; the total number of cases per judge has grown from 54 to 183. In view of the burgeoning demands on appellate courts, any rule that tends to increase judicial efficiency should not lightly be discarded.[9]

c. The federal courts have inherent supervisory authority that may be exercised "to formulate procedural rules not specifically required by the Constitution or the Congress." *United States* v. *Hasting*, 461 U.S. 499, 505 (1983); see also *Thomas* v. *Arn*, No. 84-5630 (Dec. 4, 1985), slip op. 6-7. In addition, Congress has expressly endowed both this Court and the courts of appeals with the authority to dispose of cases in such manner "as may be just under the circumstances" (28 U.S.C. 2106). We think it clear that these sources of judicial authority justify a

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[9] The doctrine has the additional advantage of allowing a court to refrain from addressing an important and difficult legal issue, such as a question of constitutional interpretation, in a context in which the resolution of the issue will not have any concrete impact upon a defendant. Cf. *Ashwander* v. *TVA*, 297 U.S. 288, 346-348 (1936) (Brandeis, J., concurring).

rule that permits an appellate court to decline to consider claims that will have no practical effect on the rights of the parties. Cf. *Thomas* v. *Arn*, slip op. 6 ("[i]t cannot be doubted that the courts of appeals have supervisory powers that permit, at the least, the promulgation of procedural rules governing the management of litigation").

To be sure, "[e]ven a sensible and efficient use of the supervisory power * * * is invalid if it conflicts with constitutional or statutory provisions" (*Thomas* v. *Arn*, slip op. 7-8). The question here, therefore, is whether the goal of relieving the burden on the courts of appeals may be achieved in a manner that does not conflict with other constitutional or statutory principles.

In attempting to apply the concurrent sentence doctrine in a manner consistent with these other principles, the courts of appeals have adopted several different approaches. The majority of the courts of appeals apply the doctrine by declining to review a conviction, but only where the unreviewed conviction is not likely to result in adverse collateral consequences to the defendant. See, *e.g.*, *United States* v. *Nightingale*, 703 F.2d at 19; *United States* v. *Lampley*, 573 F.2d at 788; *United States* v. *Kirk*, 723 F.2d at 1381-1382; *United States* v. *Hopkins*, 716 F.2d at 749; *United States* v. *Fuentes-Jiminez*, 750 F.2d at 1497. One of these courts has placed upon the government the burden of showing the absence of collateral consequences. *United States* v. *Vargas*, 615 F.2d at 960; see also *United States* v. *Peters*, 617 F.2d at 506.

Other courts have adopted the practice of vacating any conviction that is not reviewed. See, *e.g.*, *United States* v. *Adi*, 759 F.2d 404, 409-410 (5th Cir. 1985); *United States* v. *Butera*, 677 F.2d 1376, 1386 (11th Cir. 1982), cert. denied, 459 U.S. 1108 (1983); *United States* v. *Hooper*, 432 F.2d at 606. And one court—the Ninth Circuit—has determined that the doctrine cannot be applied without running afoul of constitutional and statutory limitations

on judicial authority. That court has therefore abolished the doctrine and decided to consider a defendant's challenges to each of his convictions. *United States* v. *De Bright*, *supra*. We now turn to an examination of the merits of these competing views of the concurrent sentence doctrine.

2. *A Court Of Appeals May Not Invoke The Concurrent Sentence Doctrine To Vacate A Judgment Of Conviction*

As we have noted, this Court consistently has applied the concurrent sentence doctrine to decline to review a conviction. In *United States* v. *Hooper*, *supra*, however, the District of Columbia Circuit adopted a different procedural rule. The defendant in *Hooper* was convicted on one count of theft of federal property in violation of federal law and one count of robbery in violation of District of Columbia law; he received an eight-year concurrent sentence on each count. On appeal, the defendant challenged only his federal conviction.

The court of appeals noted that the government had urged it, under the concurrent sentence doctrine, not to consider the defendant's claim; the court agreed that it was not required to address the merits of the claim, but it "follow[ed] a different path from that offered by the government" (432 F.2d at 606). Declaring that there was "no need in the public interest" to retain the convictions and sentences on both counts, the court directed the vacation of the judgment on one of the counts (*ibid.*). It stated that "[t]he vacation of the judgment does not destroy the jury verdict, but is rather equivalent in practical effect to a suspension of the imposition of sentence. If it later develops that the interest of justice so requires, the sentence can be reimposed on a concurrent basis. The conviction could then be subject to appellate review" (*id.* at 606 n.8).

Some panels of the Fifth and Eleventh Circuits, including the court below in the present case (Pet. App. A16-A17), have joined the District of Columbia Circuit in adopting this approach. See, *e.g.*, *United States* v. *Adi*, 759 F.2d at 409-410; *United States* v. *Butera*, 677 F.2d at 1386; *United States* v. *Durant*, 648 F.2d 747, 752 (D.C. Cir. 1981).

In our view, this procedure for applying the concurrent sentence doctrine cannot be justified by the federal courts' inherent supervisory power or their authority to dispose of a case "as may be just under the circumstances" (28 U.S.C. 2106). The practice of vacating unreviewed convictions offends important separation of powers principles, it devalues the role of juries and district courts, and it places the unreviewed conviction in a unique and extremely uncertain status.[10]

The text of the Constitution entrusts the Executive Branch with the authority to "take Care that the Laws be faithfully executed" (Art. II, § 3). This Court repeatedly has recognized that the Executive Branch has broad responsibility for conducting criminal prosecutions, including the power to select the charges that may be filed in a particular case. See *Ball* v. *United States*, 470 U.S. 856, 859-860 (1985); *United States* v. *Goodwin*, 457 U.S. 368, 382 (1982); *United States* v. *Batchelder*, 442 U.S. 114, 124 (1979); *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978); *United States* v. *Nixon*, 418 U.S. 683, 694 (1974); *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 457-459 (1868).

Just as a court may not overturn the government's decision regarding the charges to be brought against a defendant if that decision does not violate any constitutional or statutory norm, a court may not vacate a judgment of conviction when that result is not necessary to vindicate a

[10] Petitioner agrees (Br. 40-43) that a court may not invoke the concurrent sentence doctrine to vacate a conviction.

constitutional or statutory right. Cf. *United States* v. *Hasting*, 461 U.S. at 505-507. Any other rule would allow at the end of the criminal process the very result that is prohibited at the beginning – judicial interference with the government's discretion to select the charges to be pressed against a defendant. See *United States* v. *DeBright*, 730 F.2d at 1257; see also *United States* v. *Carrasco*, 786 F.2d 1452, 1455-1456 (9th Cir. 1986) (district court may not dismiss the indictment on the ground that the court could impose an "appropriate" sentence based on the remaining count).

An appellate court's decision to vacate a judgment of conviction is fundamentally different from a decision not to review that judgment. As one court of appeals has observed, "convictions represent the expenditure of society's resources in the investigation and prosecution of criminal conduct" (*United States* v. *De Bright*, 730 F.2d at 1257). The judgments entered by district courts are presumptively valid. Indeed, one of the basic premises of our system of appellate review is that an appellate court will not affirmatively interfere with the judgment of a lower court unless it finds error in the process that culminated in that judgment.

We do not disagree with the premise underlying the procedure adopted by the court of appeals in *Hooper*: that a conviction carrying no adverse consequences for the defendant is in some sense superfluous. In our view, however, an appellate court exceeds its proper role when it vacates a judgment of conviction simply on the basis of its conclusion that the conviction is superfluous or is not "needed in the public interest."

Finally, the application of the doctrine in this manner places the vacated conviction in a procedural no man's land, the contours of which are extremely ill-defined. The courts of appeals that follow this procedure generally direct the vacation of the "judgment," but they also in-

variably decline to overturn the jury verdict and the conviction; the courts also provide that the sentence may be reimposed at a later date in the event that a defect is discovered in the conviction that was affirmed by the court of appeals. Some courts of appeals analogize a conviction with a vacated judgment to a conviction upon which the district court has suspended sentence. See Pet. App. A16-A17; *Hooper*, 432 F.2d at 606 n.8.

When the imposition of sentence is suspended, the conviction remains on the defendant's record; the district court simply does not impose a sentence for that conviction. See 18 U.S.C. 3578, 3651. Even where an unreviewed conviction is vacated, therefore, the conviction may remain available for purposes collateral to the criminal proceeding, such as enhancement of punishment for subsequent criminal conduct or impeachment of the defendant's credibility in a subsequent trial. Since courts adopted the practice of vacating unreviewed convictions because they believed that all potential for adverse collateral consequences would be eliminated, and the practice may not accomplish that result, the vacating procedure does not even accomplish the goal that it was designed to achieve.[11]

For these reasons, we view the process of vacating unreviewed convictions as an inappropriate way to implement the concurrent sentence doctrine.

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[11] Courts could, of course, follow the procedure of vacating the unreviewed conviction itself, rather than just the sentence, but even that course would not necessarily achieve the result of insulating the defendant against any conceivable adverse consequence from the vacated conviction. For example, a state court could conclude that a conviction vacated only because the court of appeals chose not to review its validity is sufficiently reliable to be the basis for impeachment of the defendant or enhancement of sentence.

3. *An Appellate Court May Invoke The Doctrine To Decline To Review A Conviction That Is Not Likely To Result In Adverse Collateral Consequences For The Defendant*

The alternative procedure for implementing the principle embodied in the concurrent sentence doctrine is the method employed in the past by this Court: once it is determined that one of the defendant's convictions is valid, the appellate court may simply decline to review the other convictions that carry concurrent sentences. Of course, a court is not free to apply the doctrine in every situation in which the defendant has received concurrent sentences. The principle underlying the concurrent sentence doctrine is that review of the defendant's claims is unnecessary because the resolution of those issues will have no practical impact upon the defendant.

At the time the doctrine originally was formulated, the sentence was viewed as the only adverse consequence flowing from a conviction. As long as the sentences on the two counts were concurrent, therefore, the defendant would suffer no adverse consequences from an appellate court's decision not to review his challenges to each of the convictions.

This Court has now made clear that a criminal conviction has adverse consequences for a defendant that extend beyond the sentence imposed by the district court. See, *e.g.*, *Benton* v. *Maryland*, 395 U.S. at 790; *Sibron* v. *New York*, 392 U.S. 40, 56-57 (1968). The concurrent sentence doctrine therefore must take account of these potential adverse collateral consequences. As Justice Harlan stated in *Benton* v. *Maryland*, *supra*, the doctrine may be applied only if "the unreviewed conviction foreseeably will have no significant adverse consequences for the [defendant]" (395 U.S. at 802).[12]

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[12] If the reviewed conviction is invalidated as a result of subsequent proceedings in this Court or on collateral attack in the lower courts, a

Petitioner argues that this approach for implementing the concurrent sentence doctrine is defective for a variety of reasons. We address each of his arguments in turn.

a. Petitioner contends (Br. 83-85) that, because a conviction is presumptively prejudicial, a court of appeals must review a defendant's challenges to the validity of each of his convictions. That broad proposition finds no support in this Court's decisions.

The Court has considered the adverse collateral consequences attendant to a criminal conviction in a line of decisions addressing the justiciability of a defendant's appeal from a criminal conviction. In *St. Pierre* v. *United States*, 319 U.S. 41 (1943), the Court concluded that the defendant's challenge to his conviction was moot because the defendant had fully served his sentence before the Court granted the petition for a writ of certiorari (319 U.S. at 42). The Court observed that the defendant had not shown "that under either state or federal law further penalties or disabilities can be imposed on him as a result of the judgment which has now been satisfied" (*id.* at 43).

In a series of decisions over the following 25 years, the Court qualified the rule announced in *St. Pierre*, evidencing an increased willingness to recognize the collateral consequences attendant to a criminal conviction. The Court repeatedly found that a defendant's challenge to a conviction remained justiciable because of the existence of adverse collateral consequences, even though the defendant had finished serving his sentence. See, *e.g.*, *Ginsberg* v. *New York*, 390 U.S. 629, 633-634 n.2 (1968); *Pollard* v. *United States*, 352 U.S. 354, 358 (1957); *United States* v. *Morgan*, 346 U.S. 502, 512-513 (1954); *Fiswick* v. *United States*, 329 U.S. 211, 222 (1946). Finally, in *Sibron* v. *New York*, *supra*, the Court concluded that "*St. Pierre* v. *United States*, *supra*, must be read in light of later cases to mean that a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction" (392 U.S. at 57).

The Court relied upon *Sibron* when it held in *Benton* v. *Maryland*, *supra*, that the concurrent sentence doctrine was not a jurisdictional rule. The Court explained that "the existence of concurrent sentences does not remove the elements necessary to create a justiciable case or controversy" because the "mere possibility" that the defendant would suffer adverse collateral effects from the additional conviction was sufficient to render justiciable the challenge to the conviction (395 U.S. at 790).

These decisions do not mandate the abolition of the concurrent sentence doctrine. The presumption that a conviction carries adverse collateral consequences was developed by the Court to ensure the justiciability of direct appeals of criminal convictions. That presumption does not bar a court from finding that a particular defendant is not likely to suffer adverse collateral consequences as a result of a particular conviction and that, therefore, the defendant's challenge to his conviction need not be considered by an appellate court.[13]

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defendant would, of course, be entitled at that time to consideration by the court of appeals of his challenges to the previously unreviewed conviction.

[13] There is nothing unusual about a situation in which a prudential rule is invoked to bar judicial resolution of a claim that satisfies the justiciability requirements of Article III. The Court has recognized that "several judicially self-imposed limits on the exercise of federal jurisdiction" may operate to bar the claims of litigants who satisfy the standing requirement imposed by Article III. *Allen* v. *Wright*, 468 U.S. 737, 751 (1984); see also *Valley Forge Christian College* v. *Americans United For Separation Of Church & State, Inc.*, 454 U.S. 464, 474-475 (1982). Just as a plaintiff who satisfies the constitutional requirements for standing may nonetheless find his complaint dismissed under these prudential rules, a criminal defendant who has a justiciable claim with regard to the validity of his convictions may nonetheless have those claims dismissed under the concurrent sentence doctrine.

The presumption of adverse collateral consequences that is recognized in the justiciability context is just that: a presumption. It may well be inapplicable in a particular case. And a defendant is considerably less likely to be subject to such adverse consequences in the most common situation in which the concurrent sentence doctrine may be applied—where two or more convictions are based on the same underlying facts. Adverse collateral consequences generally are a result of the fact of conviction, not the number of convictions. Once a court determines that at least one conviction may properly be imposed upon the defendant, the inquiry as to adverse consequences will focus on the incremental consequences likely to flow from one or more additional convictions. In these circumstances, a court frequently may be able to find the possibility of additional adverse consequences to be quite remote.[14]

This Court has identified four basic adverse collateral consequences that may flow from a criminal conviction: delay in the defendant's eligibility for parole, an increased sentence under a recidivist statute for a future offense, the availability of the conviction to impeach the defendant's character or credibility in future proceedings, and the stigma resulting from the additional conviction. *Benton* v. *Maryland*, 395 U.S. at 790-791; *Sibron* v *New York*, 392 U.S. at 54-56. Each of these adverse consequences is considerably less likely to occur when a defendant already is subjected to at least one conviction.[15]

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[14]When the defendant challenges all of his convictions, the inquiry as to adverse collateral consequences turns upon whether the defendant is disadvantaged by the imposition of *any* criminal liability in connection with the prosecution. Adverse collateral consequences are far more likely to be found in that context than where the inquiry concerns the *incremental* collateral consequences flowing from one or more additional convictions.

[15] A defendant might claim that the unreviewed convictions somehow tainted the conviction or sentence on the reviewed counts. Such a claim would constitute a challenge to the validity of the reviewed counts as well, and therefore could not properly be avoided by invocation of the concurrent sentence doctrine. We note, however, there is normally no reason to believe that the sentence imposed by a district judge on one count would be affected by the validity of the convictions on any of the other counts.

A defendant's prospects for parole in the federal system frequently will not be affected by an additional conviction on an unreviewed count.[16] The United States Parole Commission has adopted guidelines that "indicate the customary range of time to be served before release for various combinations of offense (severity) and offender (parole prognosis) characteristics" (28 C.F.R. 2.20(a) and (b)). The guidelines also set forth the procedures used by the Commission in making parole determinations (see 28 C.F.R. foll. 2.20, at 91-107).[17]

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[16] Starting in the near future, there will be no possibility of adverse parole consequences from unreviewed convictions. The Sentencing Reform Act of 1984, Pub. L. No. 98-473, Ch. 2, 98 Stat. 1987 *et seq.*, which is scheduled to go into effect in November 1987, provides for determinate sentencing. Under that system, a defendant's prison term will be fixed at the time of sentencing by the district court; any uncertainties created by the parole process will be eliminated.

[17] The guidelines are not binding on the Commission; "[w]here the circumstances warrant, decisions outside of the guidelines (either above or below) may be rendered." 28 C.F.R. 2.20(c); see also 28 C.F.R. 2.20(d) and (e) (noting that the Commission may rely upon "especially mitigating or aggravating circumstances" to adopt an offense severity rating different from that called for by the guidelines and that "clinical evaluation" of the risk of parole violation may override the procedures described in the guidelines). As petitioner acknowledges, however (Br. 59), the overwhelming number of parole determinations fall within the guidelines. And the question here is not whether a defendant's parole release date can be predicted with certainty, but rather whether a particular unreviewed conviction is likely to be relevant to the Commission's determination. Because the guidelines specify the factors that are relevant to the Commission's decisionmaking process, they permit a court to make the latter determination with a high degree of certainty.

The first factor under the Commission's guidelines—the severity of the defendant's "offense behavior"—turns on the nature of the defendant's conduct. See 28 C.F.R. foll. 2.20, at 92-100. The guidelines specifically provide that the number of convictions imposed upon a defendant is not relevant in calculating the offense severity rating (*id.* at 101). Moreover, the guidelines state that multiple offenses committed at the same time generally are considered as a single offense unless the offenses are unrelated or unless they involve "the unlawful possession of weapons during commission of another offense" (*ibid.*).

The second factor considered by the Parole Commission—the defendant's "salient factor score"—measures the individual characteristics of the defendant. It involves an evaluation of the defendant's age and drug dependency, if any, as well as his prior criminal record. See 28 C.F.R. foll. 2.20, at 104-107. The Commission's guidelines provide that "[c]onvictions for prior offenses that are charged or adjudicated together (*e.g.*, three burglaries) are counted as a single prior conviction, except where such offenses are separated by an intervening arrest" (*id.* at 104).

The guidelines thus make clear that when the unreviewed conviction is based on the same criminal activity as the reviewed conviction, the defendant's prospects for parole will not be affected by the appellate court's decision not to review the conviction. In that setting, the appellate court can conclude with confidence that its refusal to consider the challenges to the unreviewed count will not prejudice the defendant. Even in other situations, a court often will be able to determine the risk of adverse parole consequences from an unreviewed conviction by examining the relevant portions of the guidelines. See, *e.g.*, *United States* v. *Fuentes-Jiminez*, 750 F.2d at 1497; *United States* v. *Wilson*, 671 F.2d 1138, 1139-1140 n.2 (8th Cir.), cert. denied, 456 U.S. 994 (1982).

The second potential adverse consequence identified by this Court is the possibility of an increased sentence under an habitual offender statute. These statutes typically provide for increased sentences for defendants convicted of several prior criminal offenses. See, *e.g.*, 18 U.S.C. 3575. Under most such statutes, however, multiple convictions arising out of the same facts are counted as a single offense. See 18 U.S.C. 3575(e)(1); *Benton* v. *Maryland*, 395 U.S. at 790; *id.* at 805 (Harlan, J., dissenting). The possibility that an enhanced sentence will result from an unreviewed conviction is therefore remote. Moreover, in many cases the convictions on the reviewed counts or the defendant's prior record will subject the defendant to enhanced sentencing wholly apart from the unreviewed conviction. In that circumstance, the unreviewed conviction cannot possibly result in this particular adverse consequence. *Benton* v. *Maryland*, 395 U.S. at 805 (Harlan, J., dissenting); *United States* v. *Ramos Algarin*, 584 F.2d 562, 568 (1st Cir. 1978).

Finally, at least when the multiple convictions are based on the same facts, the unreviewed conviction is not likely to impose an appreciably greater stigma upon the defendant or provide additional grounds for impeachment. A court could reasonably determine that the close similarity between the offenses would lead society at large, a jury in a subsequent proceeding, and a judge pronouncing sentence for a future offense to accord virtually no added weight to the unreviewed conviction. It seems clear, therefore, that there are at least some cases in which a court can confidently conclude that an unreviewed conviction will have no conceivable adverse collateral effects on the defendant, or that the risk of such adverse effects is vanishingly small.[18]

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[18] The Court's decision in *Ball* v. *United States*, *supra*, does not dictate a different result. The question in *Ball* was whether the Double Jeopardy Clause's protection against multiple punishments for the

b. Petitioner contends (Br. 56-59) that even if an unreviewed conviction is not likely to result in adverse collateral consequences in some situations, courts cannot predict the absence of such adverse consequences with sufficient certainty to justify their failure to review a conviction. He also asserts (Br. 43-45) that the inquiry into the potential for adverse consequences is likely to be so time consuming that an appellate court would save time by simply considering the challenge to the conviction.

As a threshold matter, we emphasize that a court of appeals is not required to apply the concurrent sentence doctrine or even to engage in an inquiry to determine whether the doctrine may properly be applied. The doctrine is designed to aid in the efficient functioning of the courts; where the inquiry regarding adverse consequences would be too time consuming or its outcome too uncertain, a court may proceed to consider the merits of the defendant's challenge to the validity of the conviction. The possibility that the doctrine may not be useful in every case, however, does not justify prohibiting a court from ever invoking the doctrine.

More fundamentally, we do not believe that the possibility that a court may err in assessing the potential for collateral consequences justifies abolishing the concurrent sentence doctrine altogether. Courts are required to make difficult determinations in a variety of contexts;

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same offense is implicated when a defendant receives two convictions, each carrying identical concurrent sentences, for conduct that Congress intended to be punishable by only a single conviction. Citing the possible adverse collateral consequences identified in *Sibron* and *Benton*, the Court concluded that "[o]ne of the convictions, as well as its concurrent sentence, is unauthorized punishment for a separate offense" (470 U.S. at 864). Like *Sibron*, *Ball* turns upon a presumption that an additional conviction carries adverse collateral consequences. It does not address the question whether a court may decline to review a challenge to a conviction where the possibility of such collateral consequences is found to be remote.

those inquiries are not pretermitted simply because a court might err. If this Court is concerned about the possibility of error, it could place upon the government the burden of establishing the absence of adverse collateral consequences. See *United States* v. *Vargas, supra*.[19]

c. Petitioner also contends (Br. 49-51) that the concurrent sentence doctrine infringes upon a defendant's statutory right to appeal. That contention is plainly wrong.

Neither the Constitution nor 28 U.S.C. 1291, which endows the courts of appeals with jurisdiction over appeals from final orders of the district courts, requires an appellate court to address the merits of all of a defendant's challenges to a conviction. A defendant need only be provided with an *opportunity* to be heard; that opportunity obviously may be conditioned on reasonable procedural rules. See *Thomas* v. *Arn*, slip op. 6-7, 14. As we have discussed, the concurrent sentence doctrine is just such a reasonable rule designed to promote judicial efficiency.[20]

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[19] If, subsequent to the application of the concurrent sentence doctrine, a defendant is threatened with adverse consequences, it might be appropriate to prohibit the use of the unreviewed conviction as the basis for those consequences. See *Benton* v. *Maryland*, 395 U.S. at 799-800 (White, J., concurring).

[20] Petitioner also urges (Br. 46-49) this Court to "declare that upon timely presentation, a defendant has a due process right to have the first appellate court determine whether he has been convicted of each element of his crime with proof beyond a reasonable doubt" (*id.* at 46). But he presents no reason why a sufficiency of the evidence claim should be given priority over a challenge to a conviction on any other constitutional or statutory grounds. Moreover, there is no reason that a court should be required to address the merits of a sufficiency claim in every case. We submit that where the conviction itself is not likely to result in any adverse collateral consequences, nothing in the Constitution requires a court to address the merits of a defendant's challenge to that conviction.

4. *The Court Of Appeals Properly Rejected Petitioner's Claim That His Unreviewed Conviction Carries Adverse Collateral Consequences*

Although we agree that it was improper for the court of appeals to apply the concurrent sentence doctrine in this case because petitioner's sentences were not concurrent, petitioner contends (Pet. 34-40) that the application of the concurrent sentence doctrine was improper for a different reason. He asserts that he will suffer adverse collateral consequences as a result of the court of appeals' failure to address the merits of his challenge to the sufficiency of the evidence supporting that conviction because the Parole Commission would have been required to shorten his prison term if the court of appeals had reversed his conviction. In view of the more obvious defect in the court of appeals' decision, there is no need for the Court to address this claim. We note, however, that petitioner is not likely to suffer any adverse parole consequences due to the court of appeals' failure to consider his challenge to his second substantive conviction.[21]

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[21] Petitioner apparently wants this Court to resolve his claim that the conviction was not supported by sufficient evidence (see Br. 54-55, 103-109). We believe that the appropriate course is to remand the case to allow the court of appeals to consider in the first instance petitioner's challenge to the sufficiency of the evidence.

Although this Court need not consider the sufficiency issue, we believe that, contrary to petitioner's assertions regarding the merits of the sufficiency issue (Br. 51-55), the evidence was amply sufficient to support the second possession conviction. Petitioner plainly was involved in a conspiracy to sell cocaine that encompassed *both* of the sales to Agent Herber (see Pet. App. A13-A14). The facts supporting the conspiracy conviction also support the conviction on the second possession count. Petitioner provided Sandoval – petitioner's co-conspirator – with what he characterized as a sample of cocaine for potential purchasers. Sandoval gave petitioner the money derived from the sale of the sample and petitioner – apparently the leader of the conspiracy – divided the proceeds. When the purchaser of the sample, Agent Herber, indicated that she wanted to purchase an additional ten ounces of cocaine, Sandoval asked petitioner for the drugs. Petitioner replied that he had only three ounces, but he promised to try to get more, and he left his apartment soon after he made that pledge. Hours later, Sandoval had obtained six ounces of cocaine; he stated to a government informant that "they hadn't come up with the ten ounces, just only six" (1 Tr. 105). Sandoval used a truck borrowed from petitioner to deliver the drugs to Herber the following day, and the drugs Sandoval provided on May 30 were of precisely the same purity as the sample petitioner had supplied the previous day. In view of the dealings between petitioner and Sandoval, the jury could reasonably conclude that the six ounces of cocaine had been provided by petitioner.

Petitioner's claim of adverse consequences relates to the first factor under the Commission's guidelines – the severity classification assigned to petitioner's offense. If petitioner's offense is treated as involving only one gram of 92% pure cocaine, the offense would be classified as a Category Two offense. See 28 C.F.R. foll. 2.20, at 98 (Guideline 921(i)). In petitioner's case, that classification would result in eligibility for parole after he serves one-third of his seven-year sentence.[22] If petitioner's offense is treated as one involving six ounces of 92% pure cocaine, the offense would be classified as a Category Five offense, and petitioner's suggested prison term would range from 48 to 60 months. 28 C.F.R. foll. 2.20, at 98 (Guideline 921(f)).

Petitioner's entire argument rests upon his assumption (Br. 39) that "[o]nce the court of appeals finds that insufficient evidence supports [petitioner's] conviction for possessing six ounces of narcotics, due process prohibits the Parole Commission from assessing the severity of [petitioner's] involvement in the conspiracy offense by reference to any evidence other than" petitioner's conviction for possession of one gram of cocaine. But it is clear that even if the court of appeals had reversed petitioner's

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[22] The guidelines would permit parole after 12 to 16 months in prison (28 C.F.R. foll. 2.20, at 91), but petitioner would not be eligible for parole until he served one-third of his sentence (18 U.S.C. 4205(a)).

conviction for possessing six ounces of cocaine with the intent to distribute it, the Parole Commission's assessment of the severity of petitioner's offense would not have been limited to his conviction for possession of one gram of cocaine.[23]

The Parole Commission's guidelines provide that the severity classification of a conspiracy conviction depends upon the "underlying offense." 28 C.F.R. foll. 2.20, at 92 (Guideline 101). The conspiracy charge in the indictment in the present case does not specify a quantity of cocaine but states that the conspiracy extended from May 25 to June 3, a time period encompassing both sales of cocaine to Agent Herber. Regardless of whether petitioner actually possessed the six ounces of cocaine, therefore, he was convicted of participating in a conspiracy to possess cocaine for the purposes of distribution that encompassed both the one gram of cocaine and the six ounces of cocaine. See Pet. App. A13-A14 (considering evidence regarding second sale in upholding conspiracy conviction).

Thus, even if the court of appeals had found that the evidence was insufficient to support the second possession conviction, the Parole Commission would have treated the conspiracy conviction as a Category Five offense in view of the clear evidence that petitioner was a participant in a conspiracy to possess six ounces of cocaine with the intent to distribute it. *DiNapoli* v. *United States Parole Comm'n*, 538 F. Supp. 658, 663 (M.D. Pa.) (defendant "was convicted of involvement in a drug *conspiracy* and therefore cannot separate himself from all of the drugs alluded to in the indictment") (emphasis in original), aff'd by order, 676 F.2d 684 (3d Cir. 1982).[24] Contrary to petitioner's claim,

[23] Petitioner raised this argument before the court of appeals (see Br. 5-10); that Court's decision to invoke the concurrent sentence doctrine apparently reflects its determination that petitioner's claim is meritless.

[24] The Commission's Procedures Manual states that "[i]f a prisoner is convicted by trial of an offense, such as conspiracy, * * * where the

therefore, the court of appeals' refusal to review the second possession conviction did not subject him to an increased prison term.[25]

severity rating is, by rule, determined by reference to the underlying offense * * *, acquittal on the underlying offense does not bar use of the conviction offense (*e.g.*, conviction for conspiracy to murder is graded as Category Eight [the severity rating for murder] even if the prisoner is acquitted of the charge of murder)." United States Parole Commission, *Rules and Procedures Manual* 24 (Nov. 4, 1985).

[25] The Commission's initial parole determination was made prior to the issuance of the court of appeals' decision; petitioner's offense severity at that time was rated as Category Five. Petitioner's appeal of that determination – filed after the court of appeals vacated the conviction – cites the vacation of the conviction as the ground for seeking a reduction of the offense severity rating. The decision of the Parole Commission's National Appeals Board stated that "[t]he record reflects that you were convicted on all three counts of the indictment, said sentences to run concurrent to each other. The total amount of drugs involved in your case was 154 grams of 100% pure cocaine. Your offense severity was accurately assessed pursuant to 28 C.F.R. Section 2.20(921)(F)." Because the evidence supporting petitioner's conspiracy conviction showed that 154 grams of pure cocaine were involved, the Appeals Board's decision was correct both in light of the evidence in the case and under the Parole Commission's procedures permitting the Commission to assess the severity of the conspiracy offense by reference to the underlying substantive offense, regardless of the disposition of the substantive offense.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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CASELOAD OF THE FEDERAL COURTS OF APPEALS

	1955	1965	1975	1985
Total Cases Commenced	3,695	6,766	16,658	28,560
Direct Criminal Appeals	677	1,223	4,187	4,989
Federal Collateral Proceedings	159	404	716	1,082
State Collateral Proceedings	70	571	871	2,172
Number of Appellate Judges	68	78	97	156
Criminal Cases Per Judge	13	28	60	53
Total Cases Per Judge	54	87	172	183

Sources: *Annual Report of the Director of the Administrative Office of the United States Courts 1955*, at 92, 152, 160-161 (1956); *Annual Report of the Director of the Administrative Office of the United States Courts 1965*, at 158, 170-173 (1966); *Annual Report of the Director of the Administrative Office of the United States Courts 1966*, at 79 (1967); *Annual Report of the Director of the Administrative Office of the United States Courts 1975*, at 174, 323, 337-341 (1976); *Annual Report of the Director of the Administrative Office of the United States Courts 1985*, at 111, 248, 272-275 (1986).

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